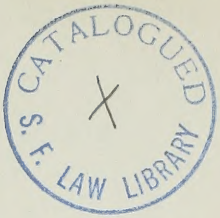
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NO. 20182

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

MADELINE CURRY, ADMINISTRATRIX OF THE ESTATE OF JACK CURRY, DECEASED,	)
Appellant,	)
vs.	)
FRED OLSON LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,	)
Appellees.	)

APPELLANT'S OPENING BRIEF

FILED
SEP 21 1955
FRANK H. SCHMID, CLERK

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NO. 20182

in the

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For the Ninth Circuit

MADELINE CURRY, ADMINISTRATRIX OF THE ESTATE OF JACK CURRY, DECEASED,	
Appellant,	
vs.	
FRED OLSON LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,	
Appellees.	

APPELLANT'S OPENING BRIEF

I

JURISDICTION.

This was an action for damages resulting from the claimed wrongful maritime death of Appellant's decedent brought in the District Court on the basis of diversity of citizenship of the parties and pursuant to the remedy provided by the California Wrongful Death Act. California Code of Civil Procedure, Section 377.[1]

1 *Text of Statute, Appendix A. California has also enacted a tort survival statute, but it is not at issue in the instant case. Civil Code §§ 956, (Added Stats. 1949, c. 1380, p. 2400, § 20).*

The District Court had jurisdiction as provided by Title 28 U.S.C. Section 1332. Jurisdiction is noted in the pleadings. See the amended complaint, Tr. p. 1.

This court has jurisdiction on an appeal from a final judgment of the District Court. Title 28 U.S.C. Section 1291.

II.

STATEMENT OF THE CASE AND QUESTION INVOLVED

One question only is raised by this appeal.

Do the words "wrongful act and neglect" used in the California Wrongful Death Act embrace an action for "unseaworthiness" as that right is known to the general maritime law, but which right may be enforced by an action either in admiralty or at law? *Sieracki vs. Seas Shipping Co.* (1945) 328 U.S. 85, 88, 66 S. Ct. 872, 874, 90 L. Ed. 1099, 1946 A.M.C. 698.

This issue was presented to the Court below by Appellees' (defendants) "Motion for Partial Summary Judgment" (Tr. p. 10) wherein the District Court was asked to dismiss the second cause of action of Appellant's (plaintiff) amended complaint (Tr. p. 3) which was based on a claim of unseaworthiness of the vessel upon which decedent met his fatal injuries.

After hearing, the District Court granted the Motion, relying solely on the decision in *Mortenson vs. Pacific Far East Lines Inc.* (N. D. Cal. 1956) 148 F. Supp. 71.

This appeal directly challenges the correctness of that ruling.

III.

SPECIFICATION OF ERRORS RELIED UPON

The errors upon which Appellant relies are as follows:

1. The trial court erred in granting Appellees' "Motion for Partial Summary Judgment" as to the second cause of action in Appellant's amended complaint.

2. The trial court erred in ruling that an action for damages under the California Wrongful Death Act could not be predicated upon a claim of unseaworthiness.

IV.

ARGUMENT

"UNSEAWORTHINESS" IS A "WRONGFUL ACT AND NEGLECT" WITHIN THE MEANING OF THE CALIFORNIA WRONGFUL DEATH ACT.

There is no decision by the California appellate courts concerning the question at hand, so we must look to the federal cases, to analogous situations in California and other states, and to logic and reason to assist us in reaching the right result here.

1. SOME HISTORICAL OBSERVATIONS.

At the outset, it has long been settled law that the federal courts will entertain an action under the California Wrongful Death Act where the action is based upon negligence and the requisite jurisdictional needs are met. *Western Fuel Co. vs. Garcia* (1921) 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

In this early and only case involving the California Wrongful Death Act to reach the Supreme Court, there is support for our view that the Statute provides more than a "negligence" remedy, and encompasses the full protection of admiralty, including a remedy for unseaworthiness.

The Court writes, 257 U.S., pp. 241-242,

> "We have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its general features so as to defeat uniformity - but the power of the states to make *some modifications or supplements* was affirmed. And we further held that *rights and liabilities* in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are *controlling wherever suit may be instituted.* Under this view *American Steamboat vs. Chace,* 16 Wall. 531, 21 L. Ed. 369 and *Sherlock vs. Alling,* 93 U. S. 99, 23 L. Ed. 819, support the right to recover under a *local* statute in *admiralty* for death occurring on navigable waters within the state when caused by tort there committed.
>
> " * * * We think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by *wrongful act,* the admiralty courts will entertain a libel in personam for damages sustained by those to whom such right is given. The subject is *maritime* and *local* in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co. vs. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086." (Emphasis added.)

Since there was no right to recover damages for wrongful death under the maritime law, *THE HARRISBURG* (1886) 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, any more than such right existed originally under the common law, it required statutory remedies to allow such right of recovery. For deaths occurring on the high seas Congress in 1920 enacted the Death on the High Seas Act (Act of March 30, 1920, c. 111, Sec. 1, 41 Stat. 537, 46 U.S.C. Secs. 761-768)[2] and for deaths to merchant seamen, wherever they occurred, Congress provided the Jones Act (Act of June 5, 1920, c. 250,

2 *Text of Statute, Appendix A*

Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec 688).[3]

The Lord Campbell Acts remedied the harsh common law rules which had denied a recovery for death, and the several states have all enacted their own versions of such remedial statutes, of which C. C. P. Sec. 377 is one. See *Harper & James, "The Law of Torts"*, Little, Brown & Co., 1956, Vol. 2, pp. 1284-1289.

These statutes have in turn provided a remedy for deaths occurring on waters within a state's jurisdiction, as well as on land, *Western Fuel Co. vs. Garcia, supra. Cf. Just vs. Chambers* (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, 1941 A.M.C. 430.

As far back as 1907 it became evident that state wrongful death acts, with whatever *remedial* and *substantive* remedies they afforded, would be enforced in admiralty. In *The HAMILTON* (1907) 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264, the Supreme Court affirmed a decree in admiralty awarding damages under the Delaware Wrongful Death Act (Del. Laws 1901, Vol. 31, p. 500) in a limitation proceeding growing out of deaths to crew and passengers from a collision of vessels at sea. It is interesting to note that the state act was applied to an incident outside its territorial waters (this was of course before the Death on the High Seas Act occupied the field). Mr. Justice Holmes expressed a view that is as persuasive today as it was more than fifty years ago, 207 U.S., p. 405,

> "We pass to the * * * question - whether the state law, being valid, will be applied in admiralty. Being valid, it created an *obligatio*, - a personal liability of the owner of *The Hamilton* to the claimants. * * * This of course the admiralty would not disregard, but *would respect the right when brought before it in any legitimate way.*" (Emphasis added.)

3 *Text of Statute, Appendix B*

It is said that the admiralty courts (and the federal courts on the law side, present jurisdiction) will entertain an action for death on navigable waters of a state which by statute has created a cause of action for wrongful death and in such cases the state statute will supplement the general maritime law. *Skovgaard vs. The M/V TUNGUS* (3 Cir. 1957) 252 Fed. 2d 14, 16, 1958 A.M.C. 619, 621. "When death occurs on navigable waters within a state whose statutes have created a cause of action for death by wrongful act, admiralty courts will entertain such an action by permitting the state statute to supplement the general maritime law."

In noting the application of state law to maritime causes of action, Justice Frankfurter in *Romero vs. International Term. Operating Co.* (1959) 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 1959 A.M.C. 832, stated 358 U.S. p. 373,

> "State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes."

Thus, a complete scheme at present, and for some years past has existed to allow such actions for death on account of wrongful act, whether such acts occur on land or on water, and if on water, territorial or the high seas. And whether such torts occur on *land* or *water*, if they are *maritime* in character, *the substantive maritime law applies. Gutierrez vs. Waterman S. S. Co.* (1963) 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297, 1963 A.M.C. 1649.

But this latter statement is the nub of controversy.

For the unseaworthiness rule is unknown to the common law. It is a doctrine unique and indigenous to the admiralty law, *The OSCEOLA* (1903) 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760, albeit enforceable at law in a proper case. *Sieracki vs. Seas Shipping Co., supra,* and *cf. Intagliata vs. Shipowners & Merchants Towboat Co. Ltd.* (1945) 26 Cal. 2d 365, 159 Pac 2d 1.

2. THE ARGUMENT THAT UNSEAWORTHINESS IS NOT WITHIN THE PURVIEW OF THE CALIFORNIA WRONGFUL DEATH ACT.

But it is argued that the wrongful death acts, California's included, are statutes which only allow actions based upon negligence, which unseaworthiness most assuredly is not, and that since contributory negligence of decedent is a bar to an action under the California Wrongful Death Act, *Buckley vs. Chadwick* (1955) 45 Cal. 2d 183, it follows that an action based on unseaworthiness, wherein contributory negligence mitigates damages but does not bar the action, is not within the purview of the California Wrongful Death Act.

3. ALL THE WORDS USED IN THE CALIFORNIA WRONGFUL DEATH ACT HAVE SEPARATE AND INDIVIDUALLY SIGNIFICANT MEANINGS.

The argument we are called upon to answer is both specious and begs the main question. For the wrongful death acts, California's included, are something more than mere negligence statutes.

The California statute here involved, C. C. P. Sec. 377, in its material part, provides:

> "When the death of a person * * * is caused by the *wrongful act or neglect* of another * * * his heirs or personal representative may maintain an action for damages against the person causing the death * * *" (Emphasis added.)

The words employed in most states are death by "wrongful act, neglect or default", while the California statute employs the words "wrongful act or neglect". The absence of the word "default" is not critical, since the controlling words with which we are here concerned are "wrongful act", and they can be construed to include "default".

Although we do not believe it necessary to support our view that unseaworthiness is within the statute's purview, at least one well respected Court has held that "neglect" covers a breach of the warranty of seaworthiness.[4]

We read the California statute to allow an action based upon negligence, and probably unseaworthiness, insofar as the word "neglect" is concerned, but to unquestionably allow an action for other tortious or wrongful but non-negligent conduct, including seaworthiness, insofar as the words "wrongful act" are concerned.

Thus the "contributory negligence" argument as a complete defense to any action under the California Wrongful Death Act is fallacious. Under any circumstances it would apply only to actions based on "negligence" *Buckley vs. Chadwick, supra.*

4. EVEN "CONTRIBUTORY NEGLIGENCE" WILL NOT BAR A MARITIME DEATH ACTION BASED ON THE STATE ACT.

It can be logically and forcefully argued that maritime death actions predicated on negligence (as opposed to unseaworthiness) are not barred by contributory negligence, but only that damages may be reduced.

4 *See infra, p. 17, Judge Learned Hand in the Halecki case.*

This result follows from the basic proposition that maritime torts are resolved according to principles unique to that law in accordance with the long established rule that the general maritime law is federal law which supercedes or enlarges state law where maritime matters are concerned and is "a system of law coextensive with, and operating uniformly in, the whole country." *Southern Pacific Co. vs. Jensen* (1917) 244 U.S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086.

This supremacy of the federal maritime law was noted and followed by the California Supreme Court in *Intagliata vs. Shipowners, etc., supra,* where, in a collision between vessels in state waters, the court held that contributory negligence was not an available defense, but that the controversy must be resolved by the federal "mutual fault" rule invoked in such maritime collision cases.

> "* * * The effect of contributory negligence is governed by the law under which the cause of action was acquired rather than by the law of the forum. * * * 'The fact that a federal right is to be ascertained in a state rather than in a federal court does not make it any less the duty of the court to apply federal law.'" *Intagliata, supra,* 26 Cal. 2d at p. 375.[5]

5. UNSEAWORTHINESS IS A "WRONGFUL ACT" AS THOSE WORDS ARE EMPLOYED IN THE CALIFORNIA WRONGFUL DEATH ACT.

The concept of what is a "wrongful act" resulting in death within the meaning of the general maritime law and applying the California Wrongful Death Act has not yet been passed upon by the California courts, nor any federal appellate court. We must turn to the decisions of other forums for guidance.

5 *And see the discussion, infra, pp. 12-14, 18-23.*

One of the most persuasive and pertinent opinions to our case is that in *Skovgaard, Admx, vs. The M/V TUNGUS, supra*, wherein the Court of Appeals for the Third Circuit had occasion to review the New Jersey Wrongful Death Act (N.J.S.A. 2A:31-1, *et. seq*). The decedent went aboard a vessel to make repairs to a pump which had burst causing a spill of hot cocoanut oil on the vessel's deck. Decedent slipped on the oil and fell to his death in a tank of hot cocoanut oil. His administratrix brought an action for damages containing two counts, one based on unseaworthiness, the other on negligence. The District Court dismissed the libel, holding that an action for death by unseaworthiness did not lie in the general maritime law, (the precise point made by appellees here) and as to the negligence question, the vessel did not owe a duty to decedent to clean up the oil spill. The Court of Appeals reversed the District Court opinion in its entirety. In passing upon the unseaworthiness question which is vital to our case, the Court said, 252 Fed. 2d 14, p. 17, 1958 A.M.C. p. 622,

> "The nature of the conduct which will create liability under the New Jersey statute is of crucial importance. The legislature describes it as 'wrongful act, neglect or default.' It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning. * * * The conduct required to impose liability, therefore, *is not limited to that conduct embraced in the historical concept of negligence. The words encompass something more.*
>
> "It is urged that since unseaworthiness is spoken of as a species of liability without fault, it cannot be a 'wrongful act, neglect or default' within the meaning of the statute. However, the characterization of unseaworthiness as liability without fault is dangerously deceptive. For urgent and sound reasons of public policy, the law has

imposed the absolute duty upon the shipowner to provide a seaworthy vessel, and liability results only as a consequence of the breach of that duty. If 'fault' means negligence alone, of course no fault is required, and to that extent only, the phrase 'liability without fault' is accurate. But to *say that one who breaches a duty is without fault is a logical as well as a legal incongruity.*

"The seaman possesses the legal right to a seaworthy ship. Whenever this legal right is infringed and harm results by *reason of the ship being unseaworthy, a 'wrong' occurs, whether it be of omission or commission.* The Supreme Court of New Jersey has defined 'wrongful act' as 'any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right.' *Louis Schlesinger Co. vs. Rice,* 4 N.J. 169, 72 A. (2d) 197, 203 (1950). Culpability is not necessary to constitute a wrong. *It is the liability-creating quality of an act which makes it wrongful.*

"If it be said that the New Jersey Act provides redress for tortious conduct alone, we answer that *providing an unseaworthy ship is a tort.* As was said in *Strika vs. Netherlands Ministry of Traffic,* 1951 A.M.C. 84, 88, 185 F. (2d) 555,558 (2CA), 1950:

"'It would follow from that analysis that the breach of the "obligation" to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be used in tort, and which may still be so treated if the distinction is important.'" (Our emphasis.)

It should be noted here that the case upon which the Court below relied in granting a "Partial Summary Judgment" on the unseaworthiness question, *Mortenson vs. Pacific Far East Lines, Inc., supra,* was expressly disapproved in *Skovgaard.*

"To the extent that *Graham vs. A. Lusi,* 1953 A.M.C. 2161, 206 Fed. 2d 233 (5 C.A. 1953), and *Mortenson v. Pacific Far East Lines, Inc.,* 1956 A.M.C. 2275, 148 F. Supp. 71 (N.D. Cal., 1956) express views on similar statutes of other states contrary to those expressed in this opinion, *we are in disagreement with them". Skovgaard, Admrx, vs. The M/V TUNGUS,* 252 Fed. 2d 14, p. 18. (Our emphasis.)

Mortenson was similarly criticized by Mr. Justice Goldberg in his partially dissenting opinion in *Gillespie, Admx, vs. United States Steel Corp.* (1964) 379 U.S. 148, p. 159, 85 S. Ct. 308, 13 L. Ed. 2d 1199, 1965 A.M.C. 1, p. 10.

Skovgaard went to the United States Supreme Court where the Court of Appeals decision was affirmed. *The Vessel M/V TUNGUS vs. Skovgaard* (1958) 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, 1959 A.M.C. 813. The Court held that the matter should be decided according to state interpretation of its own statute, but noted that the "New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act." *Skovgaard, supra,* 358 U.S. at p. 595. The Supreme Court said that the Court of Appeals, *en banc,* had given "careful consideration to the meaning of the state statute and it could not be said that its conclusion was clearly wrong." 358 U.S. p. 596.

Hence, the apodictic conclusion follows that an action for unseaworthiness may be based upon a state wrongful death act which provides a remedy for death by "wrongful act".

The four concurring justices in *Skovgaard* went further than the majority. Speaking through Mr. Justice Brennan this group believed that the *question of substantive law must be decided according to the federal maritime law, regardless of state law.*

> "It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care. * * * When the injured party seeks to enforce a 'state created remedy' for the breach of the federally defined duty owing to him, 'federal maritime law would be controlling'." 358 U.S. at p. 601.
>
> "It is enough for me that the State provide such a remedy in a general way (for wrongful death); the remedy is now a universal feature of the common-law system in this country, and in its essential features offers a sufficient basis for the operation of the general maritime law." 358 U.S. at p. 608.
>
> *Cf. Pope & Talbot Inc. vs. Hawn* (1953) 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143, 1954 A.M.C. 1.

See also *United New York etc. Pilots Association vs. Halecki* (1959) 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 1959 A.M.C. 588, and *Goett vs. Union Carbide Corporation* (1960) 361 U.S. 340 80 S. Ct. 357, 4 L. Ed. 2d 341, 1960 A.M.C., 550. The Court construes *TUNGUS* to hold that "in a maritime death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, *or* it might *choose to incorporate the general maritime law's concepts of unseaworthiness* or negligence." *Goett vs. Union Carbide Corp., supra,* 361 U. S. at p. 342. (Emphasis added.)[6]

In *Hess vs. United States* (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305, 1960 A.M.C. 527, the Court held that there was no constitutional prohibition to the application, by the maritime law, of the Oregon Employer's Liability Act (Ore. Rev. Stat. 654.305 *et. seq.*) in a death action where the result was to enlarge the survivors' rights and simplify the recovery of a verdict. Thus the Oregon Wrongful Death Act (Ore. Rev. Stat. 30.020) grounds the action on the "wrongful act or omission of another" and makes the decedent's contributory negligence a complete bar to recovery, whereas the Oregon

Employer's Liability Act imposes liability for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb" and causes the decedent's contributory negligence only to mitigate damages (the maritime standard).

"* * * We find no constitutional impediment to the application, by the maritime law, of Oregon's Employers' Liability Act to a death action in which the statute would otherwise by its terms apply. We are concerned with constitutional adjudication, not with reaching particular results in given cases." *Hess, supra,* 361 U.S. at p. 320.

It should be noted that the four judge group (Chief Justice Warren and Justices Brennan, Black and Douglas) continued in *Halecki, Goett* and *Hess* to reiterate the position they had taken in *TUNGUS* to the effect that federal maritime law was completely controlling, and they reserved their position that *TUNGUS* should be overruled insofar as it held that state substantive law, where it existed, was controlling, rather than federal maritime law.

6. JUDICIAL CONSTRUCTION OF THE DEATH ON THE HIGH SEAS ACT PROVIDES A REMEDY FOR "UNSEAWORTHINESS".

The decisions in this respect are both relevant and persuasive to an affirmative determination of the question raised by our appeal.

The Federal "Death on the High Seas Act" (Act of March 30, 1920, c. 111, § 1, 41 Stat. 537. 46 U.S.C. §§761-768) provides in part:

> "Whenever the death of a person shall be caused by *wrongful act, neglect,* or default occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages in the district courts of the United States in admiralty * *."
> (Emphasis added.)

The federal act employs the word "default" which the California statute does not, but construction of the former statute on the application of "wrongful act" offers support to our argument.

McLaughlin vs. Blidberg Rothschild Co. Inc. (D.C. S.D N.Y. 1958) 167 F. S. 714, 1959 A.M.C. 1385, upholding the right of a seaman's administratrix to predicate a count on unseaworthiness under the Death on the High Seas Act, 167 F.S. p. 716, 1959 A.M.C. p. 1387, said,

> "Infringement of a seaman's legal right to a seaworthy ship which eventuates in harm, constituted a *'wrongful act'*. The Court of Appeals for this Circuit (Second) in *Halecki vs. United New York & New Jersey Sandy Hook Pilots Assn. (2d Cir. 1958) 251 Fed. 2d 708, 1958 A.M.C. 1262,* concurred in the views enunciated by the Third Circuit (in *Skovgaard, supra.).* The reasoning which supports the construction of the New Jersey statute warrants a like construction of the almost identical phrase in the Death on the High Seas Act." (Emphasis added.)

It will be observed that the words "wrongful act" were those determinative in application of the seaworthiness doctrine.

Chermisino vs. Vessel Judith Lee Rose Inc. (D.C. Mass. 1962) 211 F.S. 36, was in accord. There a fisherman's death occurred when unseaworthy rigging fell upon him causing fatal injuries. The defendant argued that the Death on the High Seas Act did not provide a remedy for unseaworthiness. The Court replied, 211 F.S. at p. 38,

> "The quoted language ("wrongful act, neglect or default") suggests that *something more* (than negligence)*was intended.* Had the Congress wanted to limit recovery under the Act to negligence alone, it could have so indicated by using the word "negligence" as it did in the Federal Employer's Liability Act, 45 U.S.C. Sec. 51, and by reference, in the Jones Act, 46 U.S.C. Sec. 688. The nature and scope of the duty to provide a seaworthy vessel and the extent of the warranty of seaworthiness have only recently been clearly defined, and I believe that the Death on the High Seas Act was intended to apply to *all wrongful acts* which from time to time would entitle the party damaged to maintain the action."

> "I hold that the Death on the High Seas Act gives a *remedy for breach of the warranty of seaworthiness* and that libelant may recover thereunder *without proof of negligence or culpability.*" (Emphasis added.)

Gillespie, Admx, vs. United States Steel Corp., supra, expresses views which inherently say that a remedy for unseaworthiness is included in the protection of the Death on the High Seas Act. Justice Goldberg, dissenting in part, 379 U.S. 148, p. 165,

> "This statute gives an *admiralty* remedy for wrongful death to a seaman or other person occurring on the high seas. * * From this expression of congressional purpose (Congress' purpose in enacting the Death on the High Seas Act) the Court in *TUNGUS* concluded that a suit in admiralty for death of a longshoreman resulting from *unseaworthiness* of a vessel may be maintained against the vessel's owners where the death occurs in the waters of a State which provides a statutory remedy for wrongful death." (Emphasis added.)

Justice Goldberg assumes that the Supreme Court has now settled the proposition that state wrongful death statutes where applicable to marine death cases (excluding seamen covered by the Jones Act) encompass unseaworthiness claims. He writes, 379 U.S. 148, p. 159,

> "A non seaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute *both* for negligence and the general maritime doctrine of *unseaworthiness.*" (Our emphasis.)

The majority in *Gillespie* adds further, if peripheral, support to our contentions, with these comments, 379 U.S. p. 157,

> "And we may assume, as we have in the past, that after death of the injured person a state survival statute can preserve the cause of action for unseaworthiness."

The Court quoted from its opinion in *Kernan vs. American Dredging Co.* (1958) 355 U.S. 426, 430, 78 S. Ct. 394, 2 L. Ed. 382, 1958 A.M.C. 251, 255,

> "Where death occurs beyond a marine league from state shores, the Death on the High Seas Act * * provides a remedy for wrongful death. Presumably any claims based on unseaworthiness, for damages accrued prior to decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right."

Cf. Lindgren vs. United States (1930) 281 U.S. 1930, 50 S. Ct. 207, 74 L. Ed. 686, 1930 A.M.C. 399, *Cortes vs. Baltimore Insular Line, Inc.* (1932) 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368, 1933 A.M.C. 9.

Thus the Death on the High Seas Act has been construed to provide a remedy for unseaworthiness in those cases where the question has been raised.

7. JUDICIAL DECISIONS IN OTHER JURISDICTIONS CONSTRUING WRONGFUL DEATH STATUTES GIVE A REMEDY FOR "UNSEAWORTHINESS".

The Court of Appeals for the Second Circuit in *Halecki vs. United New York etc. Pilots Assn., supra,* construed the same New Jersey statute that the Third Circuit did in *Skovgaard vs. TUNGUS* and reached a like result, although Judge Learned Hand even thought that "neglect" included "unseaworthiness" in a maritime death case.

"We hold that *'neglect'* and 'default' both cover breach of warranty (of seaworthiness)." 1958 A.M.C. at p. 1062. (Emphasis added.)

In *Union Carbide Corp. vs. Goett, supra,* on remand from the Supreme Court, the Court of Appeals for the Fourth Circuit held that the West Virginia Wrongful Death Act (Stats. of West Va., Code, 54-7-5, *et. seq.*) which employs the words "wrongful act, neglect or default" encompassed a remedy for unseaworthiness.

The Court was definitely impressed by the decisions and views expressed in *Halecki* and *Skovgaard* by the Second and Third Circuits respectively. The Fourth Circuit construes the West Virginia statute in this manner, *Union Carbide Corp. vs. Goett* (4 Cir. 1960) 278 Fed. 2d 319, p. 321, 1960 A.M.C. 1125, p. 1127,

> "The West Virginia statute, Code, 54-7-5 *et. seq.*, like most wrongful death statutes, provides basically that if death is caused by an act, neglect or default which would have entitled the injured party to maintain an action if he had lived, then the person who would have been liable for the injury will be liable under the statute for the death. If Goett had survived he could have brought an action against Union Carbide in the West Virginia courts for the alleged negligence and *unseaworthiness*, and his right to recover in such an action would have been *governed by general maritime law*. It is true that such an action based on unseaworthiness was not recognized in 1863, when the West Virginia Wrongful Death Act was adopted, and that the principles presently controlling the negligence aspect of such an action had not been fully developed. We find, however, that the West Virginia legislature, in adopting the Wrongful Death Act, did not intend to limit recovery thereunder to actions based on the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to cover *all wrongful acts*, neglects and defaults which from time to time would entitle an injured party to maintain an action under the applicable substantive law, whether the common law, statutory law or *maritime law*. The West Virginia courts apply all three, in appropriate cases.
>
> "We conclude that in a maritime tort death case West Virginia would 'choose to incorporate the *general maritime law's concepts of unseaworthiness or negligence*'." (Emphasis added.)

Holley, Admx, vs. Steamship MANFRED STANSFIELD (4 Cir. 1959) 269 Fed. 2d 317, 1959 A.M.C. 2189, was an action under the Virginig Wrongful Death Act (Code of Virginia, Article 3, § 8-633) for death to a longshoreman caused by the collapse of an "overhang" of the potash cargo, which condition the decedent had himself created by digging out the potash, which had solidified, with a "payloader" (a small bulldozer). Without ruling on the

question of seaworthiness, the District Court had dismissed the action because of the decedent's own negligence, relying on what it thought to be controlling state law.

The Court of Appeals for the Fourth Circuit reversed. It held that in light of *Skovgaard, supra* and *Halecki, supra*, the maritime rules of comparative negligence controlled the case, and that on a new trial it would be necessary for the District Court to make findings on "unseaworthiness and failure to provide a safe place to work". 1959 A.M.C. p.2195.

State of Maryland ex rel. Smith vs. A/S NABELLA (U.S.D.C. Md. 1959) 176 F. S. 668, 1959 A.M.C. 2196, involved the death of a longshoreman caused by the alleged unseaworthiness of defendant's vessel. Over defendant shipowner's objection, the Court held that the Maryland Wrongful Death Act (Art. 67, Ann. Code of Md., 1957 ed.) providing a recovery for death occasioned by "wrongful act, neglect or default" included a remedy for "unseaworthiness". The Court said, 176 F. S. P. 671, 1959 A.M.C. p. 2200,

> "I believe that Maryland Court would hold that the Maryland statute is not limited to the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to apply to all wrongful acts, neglects and defaults which from time to time would entitle the party injured to maintain an action. The unseaworthiness alleged in the case at bar is such a neglect or default on the part of the shipowner, because of the onerous duty which has been placed on it by *Sieracki* and *Petterson*. I conclude that the Court of Appeals of Maryland would hold, however reluctantly, that the alleged failure of the defendant to provide a seaworthy ship, with appurtenant appliances and equipment, was a 'wrongful act, neglect or default' within the meaning of the Maryland statute."

To the same effect was *State, use of Gladden vs. Weyerhaeuser S.S. Co.* (U.S.D.C. Md. 1959) 176 F. S. 664, 1959 A.M.C. 1380. *Cf. State*

use of Maines vs. A/S NYE KRISTIANBORG (U.S.D.C. Md. 1949) 84 F.S. 775, 1949 A.M.C. 1329, *State, use of Johnson vs. United States* (4 Cir. 1948) 165 Fed. 2d 911, 1948 A.M.C. 244. The latter decision assumes that an action for unseaworthiness lies under the Maryland Wrongful Death Act, and it will be noted that this was more than ten years before *Skovgaard.*

Anthony vs. International Paper Co. (4 Cir. 1961) 289 Fed. 2d 574, 1961 A.M.C. 1890, involved interpretation of the South Carolina Wrongful Death Statute (South Carolina Code, Title 10, Ch. 23, Art. 2 § 10-1951) where death to occupants of a small boat followed its being capsized by swells from defendant's tug. Application of the appropriate navigation rules (a situation similar to *Intagliata, supra*) was the precise question involved. The Court followed *Skovgaard, Halecki* and *Goett* and held the federal general maritime law to be controlling. The Court said, 289 Fed. 2d p. 578, 1961 A.M.C. p. 1894,

> " * * * The occupants of the motorboat were drowned in the navigable waters of the State of South Carolina and recovery depends upon the applicability of the wrongful death statute of that state. * * * In the *TUNGUS* case the Supreme Court, four justices dissenting in part, held that when admiralty adopts a state's right of action it must enforce the right with whatever conditions the state has attached; and hence the federal courts cannot apply the admiralty rules to a case based on the wrongful death statute of a state unless to do so would accord with the terms of the statute as interpreted by the courts of the state. In *TUNGUS*, where the death occurred in the territorial waters of New Jersey, the courts of that state had not spoken upon the question whether in such a case the maritime or common law should apply. Nevertheless the Court of Appeals for the Third Circuit reached the conclusion (252 F. 2d 14), after careful consideration, that a claim for unseaworthiness as developed by federal maritime law was encompassed by the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et. seq.* as a matter of state law. The Supreme Court found itself unable to say that this conclusion was clearly wrong and therefore affirmed."

> "As will appear from our opinion in *Union Carbide Corp. v. Goett*, 4 Cir., 278 F. 2d 319, some doubt exists as to whether the view expressed by the majority or that expressed by the minority in *Tungus* represents the final position of the Supreme Court on this matter. In our judgment this uncertainty does not affect the decision to be taken in the pending case. It has been noted that the Third Circuit held in the *Tungus* case that the *wrongful death statute* of New Jersey *should be interpreted*, in the absence of any state decisions to the contrary, *as providing for the application of the principles of maritime law in case of death upon the territorial waters of the state*. We reached the same conclusion not only in our opinion in *Union Carbide Corp. v. Goett, supra*, in respect to the law of West Virginia, but also in the case of *Holley v. The Manfred Stansfield*, 4 Cir., 269 F. 2d 317, with regard to the wrongful death statute of the State of Virginia, Code 1950, § 8-633. We think, in the absence of any contrary indication by the courts of South Carolina, that the same ruling should be applied to the wrongful death statute of that state, for it is obviously desirable that the same principles be applied to wrongful death on navigable waters whether it occurs on the waters of a state or on the high seas, and also that the same standards be applied to govern conduct on the navigable waters of a state whether departure from those standards results in injury or in death. We have found nothing in the decisions of the courts of South Carolina to the contrary, and indeed it has been assumed by the District Court and by counsel for both sides that the principles of the maritime law should be applied in the pending case." (Our emphasis.)

Vassallo vs. Nederl-Amerik Stoomv Maats Holland (Texas S. Ct. 1961) 344 S. W. 2d 421, was a damage action for the death of a longshoreman brought under the Texas Wrongful Death and Survival Statutes (Articles 4671, *et seq.* and 5525, Vernon's Ann. Civil Stats.) in which both negligence of the vessel's owner and unseaworthiness of the vessel were charged.

The shipowner contended for a contributory negligence defense, arguing that when these statutes were enacted the maritime comparative negligence rule did not apply. The Court rejected this argument, 344 S.W. 2d p. 426,

> "Holland also argues that a statute should be interpreted as of the time of its enactment, and, applying that principle, the Survival Statute does not permit the application of the comparative negligence rule of maritime law in this case. It argues that maritime law was not available to a longshoreman until 1946, when the case of *Seas Shipping Co. v. Sieracki, supra,* was decided. We cannot agree with this contention. The comparative negligence rule of maritime law was applied in suits by longshoremen as early as 1885. See *The Max Morris*, C. C., 28, F. 881, affirmed 137 U.S. 1, 11 S. Ct. 29, 34 L. Ed. 586. The Survival Statute was not adopted by the Texas Legislature until 1925, nevertheless, meeting the test laid down in *Max Morris.*"

The Texas Wrongful Death Act provides a remedy for death resulting from

> "the wrongful act, negligence, carelessness, unskillfulness, or default (which) must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

The Court accordingly enforced the maritime rule of comparative negligence and assumed that the seaworthiness doctrine applied. The Court says, 344 S.W. 2d p. 424,

> " * * Under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert *any basis* for recovery that the decedent could have asserted if he were alive. * * * It follows that his contributory negligence must be considered only in mitigation of damages." (Emphasis added.)

Other cases which go back many years fortify our view that the substantive general maritime law applies, once a remedy is provided.

In *The GARLAND* (D.C. E.D. Mich. 1881) 5 Fed. 924, an action for damages in admiralty for the death of two boys in a collision of vessels on the Detroit River was successfully maintained under the Michigan statute (Act 38, 1848, p. 31) providing a remedy where death was caused by "wrongful act, neglect or default".

In *Holmes vs. O. & C. Ry. Co.* (D. C. Ore. 1880) 5 Fed. 75, a successful action was brought in admiralty under the Oregon Wrongful Death Act (Ore. Civil Code Sec. 367) for a death which occurred on state waters. The Court said, 5 Fed. p. 86,

> "The tort which caused the death of Perkins, having occurred upon the navigable waters of the United States is a marine one; and even if the maritime law does not give a remedy for the wrong, the law of the state having given the right to the administrator to recover damages therefor, this Court, as a court of admiralty, has jurisdiction of a suit to enforce such right."

In addition to *Mortenson vs. Pacific Far East Lines, supra,* (on which the Court below relied in deciding against Appellant), other cases contrary to the views we express are *Lee vs. Pure Oil Co.,* (6 Cir. 1955) 218 Fed. 2d 711, 1955 A.M.C. 820 (construing the Tennessee statute, (Tenn. Code, § 20-607 *et. seq.*) and *Graham vs. A. Lusi Ltd.,* (5 Cir. 1953) 206 Fed. 2d 233, 1953, A.M.C. 2161 (construing the Florida statute, Florida Death by Wrongful Act. sec. 768.01, F. S. A.).

Of these cases we can only say as we do of *Mortenson.* They are wrong not only in law but in justice and logic and should be disregarded in reaching the result we contend is proper.[7]

[7] *See comment of Circuit Judge Staley in Skovgaard, supra p. 11.*

8. THAT "UNSEAWORTHINESS" IS A "WRONGFUL ACT OR NEGLECT" TAKES SUPPORT FROM THE "STRICT LIABILITY" AND "IMPLIED WARRANTY OF FITNESS" DOCTRINES, AS APPLIED IN GENERAL TORT LAW.

Varying expressions have come from the courts over the years as to what constitutes "unseaworthiness", or its converse, "seaworthiness", but the basic meaning of the doctrine and its application have in latter days become well defined.

The historical antecedent of the rule as applied to modern day usage comes from *The OSCEOLA* (1903) 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760, with this expression, 189 U.S. p. 175,

> "* * * The vessel and her owner are * * * liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a *failure to supply and keep in order the proper appliances appurtenant to the ship.*" (Emphasis added.)

A recent exposition occurs in *Gutierrez vs. Waterman Steamship Co.* (1963) 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed.2d 297, 1963 A.M.C. 1649, where it is said 373 U.S. at p. 213,

> "* * * The seaworthiness doctrine * * * is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be *reasonably fit for the purpose for which they are to be used.*" (Emphasis supplied.)

Seaworthiness has been likened to a manufacturer's warranty of product fitness. "Competency and safety of stowage are inescapable elements of the (stevedore) service undertaken. * * They are part of the stevedore's warranty of *workmanlike* service that is comparable to

a *manufacturer's warranty of the soundness of its manufactured product." Crumady vs. The JOACHIM HENDRIK FISSER* (1959) 358 U.S. 423, 429, 79 S. Ct. 445, 3 L. Ed. 2d 413, 1959 A.M.C. 580.[8]

Although it has been suggested that the right to a seaworthy ship is an incident of the seaman's contract of service, *Mahnich vs. Southern Steamship Co.* (1944) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A.M.C. 1, it is in truth a right not grounded in or limited by contractual considerations, nor is it in any sense constrained by notions of negligence. It is, in the classic definition afforded by the Supreme Court,

> " * * Essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. * * It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Company vs. Sieracki* (1946) 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A.M.C. 698.

Social policy in large measure dictates the reason for the rule.

> " * * The hazards of marine service which unseaworthiness places on the men who perform it * * together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting thei

8 *Accord: Ryan Stevedoring Co. vs. Pan-Atlantic S. S. Corp. (1956) 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, 1956 A.M.C. 9, Italia Societa, etc. vs. Oregon Stevedoring Co. (1964) 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732, 1964 A.M.C. 1075. In these cases, the stevedore whose unseaworthy stowage, conduct or gear had caused the accident, was obliged to indemnify the shipowner who in the first instance had been held liable for unseaworthiness to the claimant.*

> burden, insofar as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this, he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost." *Seas Shipping vs. Sieracki* 328, U.S. 85, 93.

Similar considerations support "strict liability" and "implied warranty of fitness" situations.

> "The public interest in human life and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products of full responsibility for the harm they cause, even though the supplier has done his best." Prosser, *Handbook of the Law of Torts*, Third Ed., 1964, West Publ. Co., p. 673.

Reasoning akin to *Sieracki* appears in the California strict liability cases. "Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants for they can adjust the costs of such protection between them in the course of their continuing business relationship." Traynor, J. in *Vandermark vs. Ford Motor Co.* (1964) 61 Cal. 2d 256, p. 262, 391 Pac. 2d 168.

Holding that an implied warranty of fitness for consumption of food ran from the manufacturer to the consumer, independent of negligence or of contract, the California Supreme Court as far back as 1939 said, "The obligation of the manufacturer should not be based alone upon privity of contract. * * Every consideration of law and public policy require that the consumer should have a remedy." *Klein vs. Duchess Sandwich Co. Ltd.* (1939) 14 Cal. 2d 272, 280, 93 Pac. 2d 799.

That the implied warranty of fitness doctrine is encompassed by the California Wrongful Death Act and a breach thereof a tortious "wrongful act or neglect" within the meaning of the statute has been held in *Gosling vs. Nichols* (1943) 59 Cal. App. 2d 442, 139 Pac. 2d 86. There, a death resulted from consumption of tainted food. The action was abated because of defendant's death and the decision went off on that point, (it being before the adoption of the California Survival of Tort Statute, Civil Code Sec. 956 in 1949).

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> "In order for a cause of action against respondent (defendant) to have arisen, the injury to appellants (plaintiffs) must have been caused by the *wrongful act* or *neglect* of respondent, and whether considered wrongful as a breach of implied contract of warranty, or wrongful as an indirect assault upon the persons of plaintiffs, the cause would still fall within the language of subdivision 3 of section 340 of the Code of Civil Procedure."

The case is significant in that the very words used in the California Wrongful Death Act, *"wrongful act or neglect"* are here under consideration, although employed in a limitations statute. In holding that such words encompass a tortious breach of implied warranty of fitness, the analogy of a breach of the warranty of seaworthiness and its like application becomes at once apparent.

Another particularly pertinent decision is that of this Circuit in *Zellmer vs. Acme Brewing Co.* (9 Cir. 1950) 184 Fed. 2d 941, which was a damage action for the death of plaintiff's decedent and her own personal injuries, growing out of the consumption of a bottle of beer in which a dead mouse was found. The action was couched in contract and based upon breach of implied warranty of fitness, but the court affirmed a dismissal that the claim was a tort and therefor time barred by C. C. P. Section 340(3). The words "wrongful act or neglect" were said by this circuit to be "sufficiently broad to *embrace every degree of tort* that can be committed against the person (including, we believe, that for which the tort-feasor is *absolutely liable regardless of fault or negligence).*" 184 Fed. 945. (Our emphasis.)

Finally, the California Wrongful Death Act has itself been directly construed to cover actions based upon breach of implied warranty of fitness. Citing and reasoning from the California cases we have just discussed, the New York District Court concludes "that in California an action for death based upon an implied breach of warranty is within the terms of the California Wrongful Death Statute. * *" *Hinton vs. Republic Aviation Corp.* (D.C. S.D. N.Y. 1959) 180 F. S. 31, p. 37.

Ever since *Hinton* the strict liability and implied warranty rules have developed rapidly and any doubts that were noted in that opinion have now been resolved. The concurring view expressed by Justice Traynor in *Escola vs. Coca Cola Bottling Co.*(1944) 24 Cal. 2d 453, 150 Pac. 2d 436, has now become the California law. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective." Traynor, J. in *Greenman vs. Yuba Power Products Inc.* (1963) 59 Cal. 2d 57, p. 62, 377 Pac. 2d 897. See the cases there collected. Prosser, *Strict Liability to the Consumer,* 69 Yale L. J. 1099, Harper & James, *The Law of Torts, op. cit.*, Vol. 2, pp. 1569-1574.

Seaworthiness, historically resting on implied warranty, but its occurrence a wrongful act imposing strict liability where harm ensues, and its breach tortious, must of need be within the remedial scope of the California Wrongful Death Act.

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"The 'wrongful act' * * need not be based upon negligence * *. The statute (New York Wrongful Death Act, 13 McKinney's Consol. Laws of N. Y., Art. 5 Sec. 130) applies to any wrongful death, whether predicated upon facts which constitute negligence, or any other wrongful act." *Cauverien vs. DeMetz* (N.Y. 1959) 20 Misc. 2d 144, 188 N.Y.S. 2d 627, 630. In the cited case, the decedent committed suicide, and the defendants were charged with certain wilful and malicious conduct which caused decedent to take his life in a fit of temporary insanity.

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There are many instances of tortious conduct known to our law here negligence is absent. Such are strict liability for the keeping of nimals, the consequences of fires, or damage occurring from abnormally angerous things and activities, such as blasting. See Prosser, *Law of orts, op. cit.* pp. 506-544. Harper & James, *The Law of Torts, op. cit.*, ol. 2, pp. 785-867. Social policy dictates liability, just as it does n the seaworthiness cases.

Cf. Kernan vs. American Dredging Co., supra, pp. 15-16, holding hat in the absence of any showing of negligence the Jones Act - incorporaing the provisions of the F. E. L. A. - permitted recovery for death of seaman resulting from violation of a statutory duty.

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a *manufacturer's warranty of the soundness of its manufactured product." Crumady vs. The JOACHIM HENDRIK FISSER* (1959) 358 U.S. 423, 429, 79 S. Ct. 445, 3 L. Ed. 2d 413, 1959 A.M.C. 580.[8]

Although it has been suggested that the right to a seaworthy ship is an incident of the seaman's contract of service, *Mahnich vs. Southern Steamship Co.* (1944) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944 A.M.C. 1, it is in truth a right not grounded in or limited by contractual considerations, nor is it in any sense constrained by notions of negligence. It is, in the classic definition afforded by the Supreme Court,

> " * * Essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. * * It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Company vs. Sieracki* (1946) 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A.M.C. 698.

Social policy in large measure dictates the reason for the rule.

> " * * The hazards of marine service which unseaworthiness places on the men who perform it * * together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their

8 *Accord: Ryan Stevedoring Co. vs. Pan-Atlantic S. S. Corp. (1956) 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, 1956 A.M.C. 9, Italia Societa, etc. vs. Oregon Stevedoring Co. (1964) 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732, 1964 A.M.C. 1075. In these cases, the stevedore whose unseaworthy stowage, conduct or gear had caused the accident, was obliged to indemnify the shipowner who in the first instance had been held liable for unseaworthiness to the claimant.*

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> "Mere breach of contract, generally speaking, is not a tort. Yet the distinction between torts and breaches of contract is, ofttimes, so dim and shadowy that no clear line of delineation may be observed and no accurate or satisfactory definition of either may be formulated. *Rich v. New York Cent. & H.R.R. Co.*,

87 N.Y. 382; *Busch v. Interborough Rapid Transit Co.*, 187 N.Y. 388, 391, 80 N.E. 197, 10 Ann. Cas. 460. Under each cause of action whether framed in tort or on contract, default or breach of duty involves an injury. At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. Nor is an action any the less on contract because the elements of damage arise out of a trespass *(Sullivan v. Dunham*, 161 N.Y. 290, 55 N.E. 923, 47 L.R.A. 715, 76 Am.St.Rep., 274) or an assault *Busch v. Interborough Rapid Transit Co., supra)*, or other personal injury *(Doedt v. Wiswall*, 15 How. Prac. 128, affirmed, 15 How. Prac. 145; *Gillespie v. Brooklyn Heights R. Co.*, 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618, 102 Am.St. Rep. 503). Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here, the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy. *Race v. Krum, supra.* Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort. The death statute has been held to embrace an action for damages for trespass although no negligence was involved. *Sullivan v. Dunham, supra.* A similar statute has also been held to embrace an action for breach of warranty, when the breach is a violation of duty and a "wrongful act". *Greenwood v. John R. Thompson Co.*, 213 ILL. App. 371; *McLean v. Burbank*, 12 Minn 530, Gil. 438. In our own court, the breach of the implied warranty has been defined as a wrongful act. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 395, 175 N.E. 105, 74 A.L.R. 339.

"We conclude that the breach of the warranty in a case such as this was a "default" or "wrongful act" within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. Liability here is predicated upon the "default" or "wrongful act" of the seller and the exercise of due care on the part of the purchaser.

"Under the common law, a person injured through a breach of duty imposed upon another, might in his or her lifetime, recover for such injury, but death put an end to liability of the person

> responsible for such breach. The statute was enacted to remedy partially that evil, not to perpetuate it by leaving the statute open to narrow construction."

10. IT SEEMS EVIDENT THAT THE CALIFORNIA COURTS, WERE THEY REQUIRED TO RULE, WOULD DECIDE THAT THE STATE WRONGFUL DEATH STATUTE ENCOMPASSES AN ACTION FOR UNSEAWORTHINESS.

Although an express ruling has not yet come from the United States Supreme Court that federal maritime law is controlling in the application of state wrongful death statutes with a corollary enforcement of rules allowing a recovery for unseaworthiness and application of the comparative negligence doctrine, (the position taken by the four concurring justices in *Skovgaard*), it appears from later decisions that such is the present posture of the matter. This appears to be the unmistakable conclusion to be drawn from cases like *Gillespie vs. United States Steel Corp., supra.* p. 16, and this has been the attitude expressed by other federal courts. *Cf. Union Carbide Corp. vs. Goett, Admx., supra,* 278 Fed. 2d 319, p. 321, 1960 A.M.C. 1125, p. 1127.

> "In his dissents in *Hess* and *Goett* * * Mr. Justice Whitaker, who was one of the majority of five in *Skovgaard* and *Halecki* has stated that * * * he believes such cases are governed by 'the general federal maritime law as remedially supplemented by the State's Wrongful Death Act'."

The Court itself had this to say in *Kossick vs. United Fruit Co.* (1961) 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56, at 365 U.S. p. 739,

> "In allowing state wrongful death statutes, *The Tungus vs. Skovgaard*, 358 U.S. 588. *The Hamilton*, 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264, and state survival of actions statutes, *Just vs. Chambers*, 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, respectively, to grant and to preserve a cause of action based ultimately on a wrong committed within the admiralty jurisdiction, and defined by admiralty law, this Court has attempted an accomodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach. The intrusion of these state remedial systems need not bring with it any undesirable disuniformity in the scheme of maritime law."

We believe the California courts would unhesitatingly follow such a course, and enforce the federal maritime law, while allowing a state remedy. *Intagliata vs. Shipowners, supra.*

Not many maritime cases have reached the California appellate courts, but those which have do recognize the paramount and controlling nature of federal maritime law. In a death case under the Jones Act, *Rouchleau vs. Silva* (1950) 25 Cal. 2d 355, p. 358, 217 Pac. 2d 929, the Supreme Court of California says, "It may be assumed that parties to an action in a state court are entitled to the rights afforded them under federal law in admiralty matters."

Gillian vs. California Employers Stabilization Comm. (1955) 130 Cal App. 2d 102, 278 Pac. 2d 528, was a case where the matter under consideration was the effect "maintenance and cure" had on seamen's rights to state unemployment benefits. In holding these maritime rights were separate and apart and no bar to rights otherwise available under California law, the Court said, 130 Cal. App. 2d, p. 112, "State courts must determine

the rights of the parties under the maritime law 'as a system of law coextensive with and operating uniformly in, the whole country'." (This was express recognition of the *Jensen* doctrine.)

O'Hey vs. Matson Navigation Co. (1955) 135 Cal. App. 2d 819, 288 Pac. 2d 81, was a longshoreman's personal injury action based on a claim of unseaworthiness, in which a verdict for the plaintiff was affirmed on appeal, the Court having occasion to review and follow federal law. *Sieracki vs. Seas Shipping Co., supra.*

Two well considered New York cases, *Kuhn vs. City of New York* (N.Y. Ct. App. 1937) 274 N.Y. 118, 8 N.E. 2d 300, and *Riley vs. Agwilines, Inc.* (N.Y. Ct. App. 1947) 296 N.Y. 402, 73 N.E. 2d 718, support our position. These were maritime death suits brought in the state court under the Saving Clause, 28 U.S.C. Sec. 1333 (1) and were based upon maritime theories of negligence and unseaworthiness. The New York Court of Appeals recognized that the New York Wrongful Death Act provided only the remedy and that federal law was the source of substantive application. "We must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our courts or statutes of the State which conflict with the rules of liability established in the Federal courts." *Riley vs. Agwilines,* 296 N.Y. 402, 405, 406, 73 N.E. 2d, p. 719.

In *Kuhn vs. City of New York, supra,* a death action was brought under the New York Statute, and the vessel on which a boiler had exploded was found to be unseaworthy. It was assumed that "seaworthiness" was a protected right. The Court says, *Kuhn vs. City of New York,* 8 N.E. 2d 300, p. 304,

> "* * * While any appropriate remedy afforded by the common law and the New York Death Statute is saved * * * The Substantive rights and obligations of the parties arose not out of local law of New York state, but under the maritime law of the United States * * * Notwithstanding the action is brought in the state court, the principles and rules of the substantive maritime law are alone to be applied as grounds, if any, for recovery."

The California statute will be liberally construed. Thus where the statute of limitations has not barred one of the parties on account of his infancy at the time the cause of action arose, it will not bar the other parties who otherwise would be time barred. *Nolan vs. Trans Ocean Air Lines* (1961) 365 U.S. 293, 81 S. Ct. 555, 5 L. Ed. 2d 571, relying on *Leeper vs. Beltrami* (1959) 53 Cal. 2d 195, 347 Pac. 2d 12.

It must be remembered that the California Wrongful Death Act was first adopted in 1872. Many sociological and scientific developments have followed with the years. Advances in science and technology have occurred which were undreamed of then -- automation, communication, the conquest of the air, of the ocean, and of space. Industry, agriculture, business and government - modern man - continue to embark on ever more remarkable adventures.

Certainly the law is no laggard. It cannot fall behind while the rest of society advances. Ours should be a dynamic and living law, ready to meet every challenge of a changing social order.

The law of 1872 must meet the needs of 1965. The words are there.[10] In the small arena in which our case is cast, the statute can be applied

10. Compare the language in Goett, supra p. 18.

to meet the broadest contemporary need, just as the Constitution of 1787 has been interpreted to meet the most exacting demands of modern times. All that is required is a bold approach to the solution of a problem which by such answer would do no violence to law or logica, but indeed would serve both.

The first modern concept of "unseaworthiness" did not come until 1903 in *The OSCEOLA*. The rule developed until its modern day expansion to protect longshoremen and all who did ship's work as expounded in 1946 in *Sieracki*. It has even gone ashore in *Gutierrez*. As need required, the Supreme Court fashioned the doctrine to satisfy the times - and always to obtain a necessary social result.[11]

But, as the seaworthiness doctrine has grown, so has the law in many fields, and one of those most pertinent to our case - in the area of "strict liability" and "implied warranty of fitness". "The requirement of timely notice of breach of warranty (Civil Code § 1769) is not applicable to such tort liability just as it is not applicable to tort liability based on negligence." *Vandermark vs. Ford Motor Co., supra,* 61 Cal. 2d, p. 263.

The same philosophy of justice permeated the legislatures which enacted the wrongful death statutes. These were intended to alleviate wrongs which existed in an archaic past. Their interpretation must be no less generous.

11 *See Mahnich vs. Southern Steamship Co., supra,* and *Mitchell vs. Trawler Racer Inc. (1960) 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 A.M.C. 1503, which trace the growth and development of the doctrine. Notions of transitoriness and notice are foreign to its application.*

Mr. Justice Cardozo said it well in *Van Beeck vs. Sabine Towing Co.* (1937) 300 U.S. 342, 57 S. Ct. 452, 81 L. Ed. 685, 1937, A.M.C. 311, 300 U.S., p. 350,

> "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * *
>
> There are times when *uncertain words are to be wrought into consistency and unity* with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed'. * * * Its intimation is clear enough in the statutes now before us that *their effects shall not be stifled without the warrant of clear necessity, by the perpetuation of a policy which now has had its days.*" (Our emphasis.)

V.

CONCLUSION

We are dealing here with a matter of general maritime concern. It is an area where "concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging." *Weinstein vs. Eastern Airlines* (3 Cir. 1963) 316 Fed. 2d 758, 763.

"We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned. * *" Mr. Chief Justice Hughes in *Detroit Trust Co. v. The THOMAS BEACHEM* (1934) 293 U.S. 21, 52, 55 S. Ct. 31, 41, 79 L. Ed. 176.

Any question or uncertainty in the construction of the California Wrongful Death Act in its maritime application must be resolved in the broadest and most protective manner to achieve results consistent not only with the remedial purpose of the statute, but also with the like purposes of the admiralty itself.

"If we would guide by the light of reason, we must let our minds be bold." Mr. Justice Brandeis dissenting in *New State Ice Co. vs. Liebman* (1932) 283 U.S. 262, 309-311.

It is respectfully submitted that the judgment below must be reversed.

Dated at San Francisco on September 21, 1965.

Redland and Pinney

Dorsey Redland

Van H. Pinney
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of the within Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my Opinion, the within Brief is in full compliance with those Rules.

VAN H. PINNEY
Attorney for Appellant

Appendix A

CALIFORNIA WRONGFUL DEATH ACT

California Code of Civil Procedure, Section 377

Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions

"When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the pro-

visions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party." (Enacted 1872. As amended Code Am. 1873-74, c. 383, p. 294, § 40; Stats. 1935, c. 108, p. 460, § 1: Stats. 1949, c. 1380, p. 2401, § 4.)

Appendix B

DEATH ON THE HIGH SEAS ACT

46 U. S. C., Sec. 761

Right of action; where and by whom brought

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." (Mar. 30, 1920, c. 111, §§ 1, 41 Stat. 537.)

Appendix C

Jones Act

46 U. S. C., Section 688

Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, §§ 20, 38 Stat. 1185; June 5, 1920, c. 250, §§ 33, 41 Stat. 1007.)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Appellant,	)	
vs.	)	No. 20178
SHIRLEY C. THOMPSON,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant,	)	
vs.	)	No. 20178
SHIRLEY C. THOMPSON, Appellee.	)	

APPELLANT'S REPLY BRIEF

Appellee reasons that since she and Joel Bailleres were not "legally" married nor related by blood, she could not be a member of Bailleres' "family" so as to fall within the household exclusion of appellant's policy. The error of appellee's reasoning is exposed by the cases of State Farm Mutual Auto Ins. Co. vs. James, 80 F.2d 802 (CCA W. Va. 1936), and the case of Hunter vs. Southern Farm Bureau Casualty Insurance Co., 241 S. C. 446, 129 S.E. 2d 59 (1962). In both of these cases the court held the household exclusion to apply to a person unrelated by blood or marriage to the insured. In the Hunter case, as here, a "legal" marriage was impossible since one of the parties was already married to another person, however, the court held the claimant to be excluded as a member of the family of the insured.

The "ambiguity" which appellee urges the court to

find in appellant's policy is illusory at best. Certainly, as appellee argues, the determination of whether a given person is a member of the family will vary with the facts of each case concerning the living arrangements of the parties. However, the multitude of cases cited by both appellant and appellee disclose none in which the courts found any ambiguity whatsoever in the household exclusion clause.

Appellee cites no authority contrary to the Hunter case. However, appellee argues that since she and Bailleres quarreled and separated several months after the accident, they had no "permanent domestic relationship" such as that in the Hunter case. The record, however, clearly demonstrates the domestic character of appellee's relationship with Bailleres. They lived together as husband and wife (T.R. 33) and, indeed, appellee believed herself to be lawfully married to Bailleres (T.R. 31). She told her friends he was her husband (T.R. 68, 75); they ate together (T.R. 68, 75), and had sex relations (T.R. 56, 59).

The household exclusion of appellant's policy excludes coverage only of those who are members of the family of the insured at the time of the accident. The fact that appellee and Bailleres separated several months thereafter could not retroactively affect the coverage or exclusions of appellant's policy.

Appellant respectfully submits that, under the above

facts and authorities, the trial court erred in granting judgment in favor of appellee and in failing to grant judgment in favor of appellant.

Appellee's argument that the court below did not find Bailleres guilty of non-cooperation is not borne out by the record. In its answer, appellant affirmatively alleged that Bailleres had wholly and totally failed, neglected and refused to cooperate with appellant insurer thereby relieving appellant from any obligation whatsoever to the said Bailleres or to appellee Shirley C. Thompson (R.T. 4-6). Motions for summary judgment were filed by both appellant and appellee supported by affidavits, letters, and further documents. Although appellee Shirley C. Thompson denied that at the time of the collision she was a member of the family of Joel Bailleres, she did not in any way deny nor controvert appellant's proof that Bailleres had been guilty of non-cooperation. Rather, appellee chose to confess such non-cooperation seeking to avoid the defense by relying on the case of Jenkins vs. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145 (1964).

On February 18, 1965, the court below ruled granting appellee's motion for summary judgment and denying appellant's motion for summary judgment (R.T. 112). The question arose as to whether appellant should be liable for the entire $10,000.00 policy limit (R.T. 19), or the $5,000.00 limits

required by the Financial Responsibility Law of Arizona at the time of the accident.

§28-1170 G, A. R. S., provides:

> "A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this action."

The matter was extensively briefed and argued, and the court below ruled sustaining appellant's position and awarding to appellee judgment in the sum of $5,000.00 (the Financial Responsibility Limit) rather than the $10,000.00 (appellant's policy limits) (R.T. 28); in so ruling, the court, of necessity, determined that appellant's defense of the non-cooperation of Joel Bailleres was valid as to the excess coverage of appellant's policy over the limits required by the Financial Responsibility Law.

Matters which have been raised by the pleadings in a case are considered determined as between the parties. Grand International Brotherhood of Railroad Engineers vs. Mills, 43 Ariz. 379, 31 P.2d 971 (1934). Appellee's argument that the record before this court does not show sufficient evidence upon which the trial court based its determination of non-cooperation is improper for several reasons:

1. Appellee raised no objection whatsoever in the

trial court concerning appellant's evidence of Bailleres' non-cooperation, and its material and prejudicial effect upon appellant insurer.

2. Appellee has filed no cross-appeal herein concerning the trial court's refusal to award appellee the remaining $5,000.00 of appellant's policy limits over the financial responsibility limits.

Appellee's attack lies exclusively in her contention that the Arizona Supreme Court, in the Mayflower case, abrogated the policy defense of non-cooperation. A reading of the Mayflower case will, however, demonstrate that the Mayflower case merely holds the "omnibus" (permissive user) clause to be a mandatory part of all motor vehicle liability policies in Arizona, whether "certified" as proof of financial responsibility after an accident or not. In Mayflower, the Arizona court followed the lead of the California Supreme Court in the case of Wildman vs. Government Employment Insurance Co., 48 Cal.2d 31, 307 P.2d 359 (1957).

In Wildman, the California court held that an endorsement which purported to limit omnibus coverage only to members of the named insured's immediate family was invalid because of public policy. Wildman, however, is no longer the law in California. In 1963, the California Legislature amended the California Motor Vehicle Code §1650 to provide that the requirements thereof:

> "shall apply only to those policies which have been certified as proof of ability to respond in damages in §16-431."

Aside from California and Arizona, Florida is the only other jurisdiction in which the courts have read an omnibus clause into all policies whether certified or not because of the public policy manifested by the Financial Responsibility Law, Lynch-Davidson Motors vs. Griffin, 171 S.2d 911 (Florida Appellate 1965).

However, both in California and Florida, contrary to the holding of the trial court herein, the defense of non-cooperation is still available to an insurer. In the case of Campbell vs. Allstate Insurance Company, 60 Cal.2d 303, 384 P.2d 155 (1963), the California court clearly held that "an insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, * * *."

In Campbell, the California court relied upon its earlier decision in Hynding vs. Home Accident Insurance Co., 214 Cal. 743, 7 P.2d 999 (1932). In Hynding, the California court held that a breach of the cooperation clause by the insured relieved the insurer from liability to pay the injured parties judgment rendered against the insured. With reference to the California Financial Responsiblity Law, the court stated:

> "We see no escape from the conclusion that the violation of the co-operation clause by the assured was a valid defense against the injured party's action. We say this with the knowledge

> that in some cases it may work a hardship on such party, who is ordinarily in no position to force the assured to co-operate.
>
> * * * * * *
>
> "It is not a compulsory insurance law, requiring every automobile owner or those in a particular class to secure insurance for the protection of the public generally. This latter type of statute, frequently found in the regulation of taxicabs and other carriers for hire, has usually been given a construction consonant with its purpose, as a result of which the injured party is permitted to recover against the insurance company regardless of the acts of the assured.
>
> * * * * * *
>
> "To require the co-operation of the assured to the extent of attendance at the trial, when he is a material and important witness, is a perfectly reasonable condition. Failure to testify may be as damaging as failure to give notice of the accident or of the suit. There is, of course, no obligation on his part to testify favorably to the company's interests, but here his report of the accident indicated that a defense existed, and it would normally be expected that his testimony would bear this out. Under these circumstances the company was clearly prejudiced by his failure to appear." (7 P.2d at 1002)

Likewise, the defense of non-cooperation is still available in Florida. Cf. American Fire and Casualty Co. vs. Collura, 163 So.2d 784 (Fla. App. 1964).

The reasoning of the court below in granting judgment in favor of appellee was essentially as follows:

1. In Mayflower the Arizona court held that the omnibus provisions of §28-1170 B, A. R. S., apply to all policies of motor vehicle liability insurance, whether certified or not.

2. The Arizona court must also have intended that §28-1170 F 1, A. R. S., which provides:

> "The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs."

to also be a mandatory part of all policies of insurance, whether certified or not.

The authorities, however, are uniform that such "absolute liability" provisions (as §28-1170 F 1, A. R. S.) do not apply to a voluntary, non-certified policy of automobile liability insurance. In the case of Cohen vs. Metropolitan Casualty Ins. Co., 233 App. Div. 340, 252 N.Y.S. 841 (1931), the New York court stated:

> "A reading of the whole act, and, in particular, sections 94-i, 94-d and 94-e, convinces us that the words 'Motor Vehicle Liability Policy' as defined in the act must refer to 'required' policies only. To make the act applicable to all liability policies would mean that whenever such a mishap occurred the insurance carrier would always be absolutely liable under all circumstances. We cannot concur with this reading. The purpose to be furthered by the act, and its limitations, are clearly apparent. It is intended to protect the public from suffering loss through the carelessness of automobile owners who have manifested their financial irresponsibility. It differentiates between car owners who have shown themselves to be irresponsible, and those who have not. It declares that when those who carry liability policies through legal compulsion cause damage in automobile operation, their insurance carriers are absolutely liable for the resulting loss; but it lays down no such rule in the case of the automobile owner voluntarily carrying such a policy, whose

responsibility has never been questioned. The construction contended for by plaintiff would encourage fraud and deceit, and would create a legal relationship so unfair and unreasonable as to be unconscionable."

Other cases to the same effect are:

Adriaenssens vs. Allstate Insurance Company, 258 F.2d 888, 890 (10th Cir. 1958);

Aetna Casualty & Surety Co. vs. Simpson, 228 Ark. 157, 306 S.W.2d 117 (1957);

Connell vs. Indiana Insurance Company, 334 F.2d 993 (4th Cir. 1964);

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Travelers Ins. Co. vs. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1950); and

United States Fidelity and Guaranty Co. vs. Walker, 329 P.2d 852 (Okla. 1958).

CONCLUSION

Appellant respectfully submits that the authorities cited above establish that the court below erred in granting appellee's motion for summary judgment and in granting judgment in favor of appellee, and further that the court erred in failing to grant appellant's motion for summary judgment and in failing to grant judgment in favor of appellant on the basis that appellee's claim is excluded from the coverage of appellant's policy of insurance and further that by reason of the non-cooperation of Joel Bailleres, the insured, which non-cooperation constitutes a material and prejudicial breach of such policy, appellant is relieved from liability to both Bailleres and appellee. The judgment of the court below should be reversed with directions that judgment be entered in favor of appellant and against appellee.

Respectfully submitted,

KENNETH S. SCOVILLE

By _____
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Attorneys for Appellant

RECEIPT OF SERVICE

Due service and receipt of three copies of the foregoing Appellant's Reply Brief acknowledged this 3 day of November, 1965.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEROY W. HOFMANN

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Appellant,	)	
vs.	)	No. 20178
SHIRLEY C. THOMPSON,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

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FILED
SEP 15 1965
FRANK H. SCHMID, CLERK

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Appellee.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF BASIS OF JURISDICTION

U. S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA

In the complaint, appellee (plaintiff below) alleged that the amount in controversy was in excess of $10,000.00 exclusive of interest and costs and that appellee was a resident of Idaho, whereas appellant was a mutual insurance company organized under the laws of Illinois. (Transcript of Record (hereinafter referred to as T.R.) 1.) 28 U.S.C.A. §1331-2.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On March 29, 1965, the U. S. District Court for the District of Arizona entered Summary Judgment in favor of appellee and against appellant. (T.R. 128) On April 26, 1965, appeal was taken to this court (T.R. 57). 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

This is an action brought in the U. S. District Court for the District of Arizona against appellant, State Farm Mutual Automobile Insurance Company to recover from appellant upon a judgment for bodily injuries arising out of an automobile accident, said judgment having been rendered in Superior Court of Arizona, in and for the County of Maricopa, in favor of appellee and against Joel Bailleres, an "additional insured" under a policy of automobile liability insurance issued by appellant.

The automobile insurance policy upon which this action is based excludes damages for bodily injury to the insured or any "member of the family of the insured residing in the same household as the insured." (T.R. 20)

Prior to August 4, 1959 (the date of the accident), appellee Shirley C. Thompson was married to John F. Thompson; however, she believed that her marriage to John F. Thompson had been finally terminated by final divorce prior to August 1, 1959, and that she was under no legal disability which would prevent her entering into another lawful marriage. (T.R. 69, 76)

Prior to August 4, 1959, Shirley C. Thompson resided in and maintained her household in an apartment in Scottsdale, Arizona. Over the weekend of August 1 and 2, 1959, Shirley C. Thompson and Joel Bailleres travelled together to Nogales, Sonora, Mexico, with the intent and purpose of getting

married to each other (T.R. 56, 59). In her deposition, Shirley C. Thompson testified that she got drunk and doesn't remember the marriage ceremony (T.R. 31). Appellee and Joel Bailleres registered in a hotel in Nogales as husband and wife, and while so registered, resided in the same room at the hotel and engaged in sexual relations (T.R. 56, 59).

Shirley C. Thompson and Joel Bailleres returned together from Nogales to Scottsdale, Arizona, and Joel Bailleres took up residence in the same household as Shirley C. Thompson (T.R. 56, 59). They resided together in the same apartment for about a week prior to August 4, 1959, the date of the accident (T.R. 68, 75). During this period, appellee and Joel Bailleres lived together as husband and wife (T.R. 33). They prepared their meals together and ate together. Appellee told some of her friends that she and Joel Bailleres were married (T.R. 68, 75).

On August 4, 1959, appellee and Joel Bailleres had dinner together at their apartment (T.R. 34); they went next door together to a friend's house (Eleanor Gunderson) to watch television (T.R. 35). Around 10:00 or 10:30 p.m., they left the Gundersons and went to the Wagon Wheel bar (T.R. 37). Later that evening the accident occurred.

After the accident, appellee was hospitalized (T.R. 38). She also told the nurses that she was married to Joel Bailleres (T.R. 68, 75). Bailleres picked up the appellee at the hospital, took her to their apartment where they continued to live together as husband and wife for another month and a half

(T.R. 38, 68, 75). Bailleres then stated to appellee that they weren't really married in Mexico and they separated (T.R. 40).

Appellant's policy provides: "No action shall lie against the company: Unless as a condition precedent thereto there shall have been full compliance with all terms of this policy."

The policy further provides:

> "3. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance." (T.R. 21)

On August 31, 1959, Joel Bailleres expressly entered into a non-waiver of rights agreement with State Farm Mutual Automobile Insurance Company (T.R. 89).

On or about June 7, 1960, suit was filed by Shirley C. Thompson against Joel Bailleres. Subsequent to the filing of the suit, Joel Bailleres notified State Farm of the suit and requested that the company employ counsel and defend the action. By reason of the aforesaid demands and the provisions of said policy, appellant caused the usual and proper investigation of the facts and circumstances surrounding the accident to be prepared and employed Kenneth S. Scoville of Phoenix, Arizona, to answer and defend the action on behalf of Joel Bailleres. On or about November 14, 1960, said attorney prepared and served an answer in said action. Thereafter,

It was discovered that at the time of the accident Shirley C. Thompson and Joel Bailleres were living together and holding themselves out to be husband and wife and that said Shirley C. Thompson was a member of the family of said Joel Bailleres, residing in the same household as Joel Bailleres (T.R. 85).

On October 17, 1960, appellant caused a letter to be mailed via certified mail in the United States Post Office, Phoenix, Arizona, return receipt requested, to Joel Bailleres, at his last known address, further expressly informing him of his obligation to cooperate and reserving the company's rights in regard to defense (T.R. 90-92).

On November 8, 1960, appellant received a letter signed by Joel Bailleres in which Bailleres warranted and promised to cooperate with the company and its attorneys (T.R. 93).

On November 10, 1960, appellant again by letter (T.R. 93a) notified Joel Bailleres at his last known address of his duty of cooperation.

Thereafter Joel Bailleres wholly and totally failed and refused to cooperate with appellant and wholly and totally failed and refused to keep appellant and its attorneys advised of his whereabouts. Numerous letters were sent to Bailleres at his last known addresses, but to no avail. Appellant claims personnel, both locally and all over the country, searched diligently and pursued all customary and proper forms of investigation and inquiry to determine the whereabouts and residence address of Joel Bailleres, but to no avail. By reason

of the non-cooperation of said Joel Bailleres and other policy defenses, the attorneys hired by appellant had no alternative but to withdraw from the representation of said Joel Bailleres (T.R. 85).

On March 13, 1962, judgment was rendered in favor of appellee and against Bailleres in Cause No. 116606 in the Superior Court of Arizona, in and for the County of Maricopa, in the amount of $32,658.50, including costs (T.R. 1). Thereafter, appellee brought suit against appellant insurer in the court below to recover on the judgment against Bailleres (T. R. 1-3). An answer was filed on behalf of appellee (T.R. 4-6). After performing discovery, etc., both appellant and appellee filed Motions for Summary Judgment supported by affidavits, etc. (T.R. 24-42, 81-93, 8-23, 94-108).

Appellant insurer's motion for summary judgment was based upon the "household exclusion" clause and the defense of non-cooperation. Appellee did not controvert the facts of Bailleres' non-cooperation, rather, appellee argued only that:

> "the defense of non-cooperation has been eliminated in the State of Arizona by the provisions of Arizona Revised Statutes §28-1170 (f) and the cases of Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136, Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145." (T.R. 9)

Both motions were extensively briefed and argued, and on February 18, 1965, the court below entered an order granting appellant's motion for summary judgment and denying appellee's motion for summary judgment (T.R. 112).

Both appellant and appellee filed proposed forms of judgment. Appellee's proposed judgment awarded the sum of $10,000.00 (appellant's policy limits), plus interest on the entire judgment of $32,658.50 from March 13, 1962 (the date of entry of judgment in the Superior Court of Maricopa County). Appellant objected to the appellee's judgment on the ground that in any event appellant's liability was limited to the $5,000.00 limits required by the Arizona Financial Responsibility Law §28-1170 B 2 A.R.S. at the time of the accident in 1959. Appellant also objected that the interest could not exceed interest on the $5,000.00 limits, not interest on the entire judgment of $32,658.50 (T.R. 113-115, 124-127). On March 29, 1965, the court below entered judgment in accordance with appellant's proposed form of judgment (T.R. 128) and thereafter this appeal was timely taken (T.R. 129).

SPECIFICATION OF ERRORS

Appellant submits that the court below erred:

1. In granting appellee's motion for summary judgment,
2. In entering judgment in favor of appellee and against appellant,
3. In denying appellant's motion for summary judgment,
4. In failing to enter judgment in favor of appellant and against appellee, and

5. In denying appellant's motion to vacate and/ or alter and/or amend such judgment.

All for the following grounds and reasons:

A. Appellant submits that the uncontroverted evidence established that at the time of the said accident appellee was a "member of the family" of Joel Bailleres, and "residing in the same household as the insured," Joel Bailleres, and holding themselves out as husband and wife, and thereby excluded from the coverage of appellant's policy.

B. It is admitted that subsequent to the alleged accident that said Joel Bailleres failed to cooperate with appellant-insurer, seriously prejudicing appellant and thereby materially breaching a condition of said policy, compliance with which is expressly made a condition precedent to appellant's liability and further that by reason of such material breach, appellee is also prevented from seeking recovery from appellant-insurer.

ARGUMENT

A. Summary:

1. Appellee is excluded from appellant's policy by the "household exclusion" clause.

2. Non-cooperation of the insured is a valid policy defense under Arizona law.

B. HOUSEHOLD EXCLUSION CLAUSE:

The uncontroverted evidence clearly indicates that at the time of the accident, as a matter of law, Shirley C. Thompson was a "member of the family" of the insured (Bailleres), residing in the same household as the insured, so as to fall within the "household exclusion clause" in appellee's policy. Shirley Thompson and Bailleres were living together as husband and wife, even though not legally married. They took their meals together, had sex relations and Shirley Thompson introduced Bailleres to others as her husband. A clearer "family" arrangement could not be found.

In the case of Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855, 50 A.L.R.2d 108 (1953) plaintiff and defendant were brothers and both lived at their parents' home. The court held that plaintiff fell within the household exclusion and stated:

> "'...The word "family" is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. Dodge v. Boston & Prov. R. R. (Corp.), 154 Mass. 299, 28 N.E. 243, 13 LRA 318. In that sense it has frequently been defined as synonymous with household.'
>
> Here the word 'family' is used in a clause restricting the liability of an indemnity insurer in an automobile policy. Its obvious purpose is to exempt the insurer from liability to one who would

> naturally and inevitably be partial to another because of the close filial ties which exist between members of the same family circle living in the same household. The same reasons exist for restricting its liability to those not members of such family circle whether the injured party is the head of the household, a child or spouse of the head, or simply a member of it. Under these circumstances, the words used should be given that meaning which they ordinarily would have in order to effectuate the obvious purpose intended by the exclusionary clause. The trial court correctly held that plaintiff was within the excluded class."
>
> 50 A.L.R.2d 118, 119.

In another case involving appellant's policy, the household exclusion clause of defendant's policy has been held to apply to persons who are not relatives by blood or marriage of the insured.

In State Farm Mutual Auto. Insurance Company v. James, (CCA W. Va. 1936) 80 F.2d 802, the court held the household exclusion to apply to "a paying boarder, who, after she lost her employment, continued to spend about half her time at the insured's home, paying nothing, but sometimes helping with household work, performing small services of her own accord, sleeping with one of insured's daughters, eating her meals with the family, and associating with them generally." (50 A.L.R.2d 122)

Perhaps the closest case on point is that of Hunter v. Southern Farm Bureau Casualty Insurance Co., 241 S.C. 446, 129 S.E.2d 59 (1962). In the Hunter case the court held the household exclusion to apply to a woman who was living

adulterously with the insured as his wife, even though the insured had a living wife from whom he was not divorced Appellant respectfully submits that the uncontroverted evidence and authorities clearly indicate that the court below erred in failing to hold that appellee fell within the household exclusion clause of appellant's policy and was therefore not entitled to the benefits of the liability provisions On these grounds alone appellant respectfully submits that the judgment of the court below should be reversed, and the case remanded with instructions that judgment be entered in favor of appellant and against appellee.

C. JOEL BAILLERES' BREACH OF THE COOPERATION CLAUSE OF DEFENDANT'S POLICY PRECLUDES APPELLEE FROM RECOVERY.

It is uncontroverted that Joel Bailleres breached his duty of cooperation owed to defendant under its policy and that such breach materially prejudiced defendant insurer, thereby obviating any liability which defendant might have to either Bailleres or to appellee. The court below so found in awarding appellee $5,000.00, the Financial Responsibility limits, rather than $10,000.00, the actual limits of appellant's policy. The court below held that (to the extent of the limits required by the Arizona Financial Responsibility law) "non-cooperation" is no longer a valid defense in Arizona after the case of Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145 (1963). In the Mayflower case, the Arizona Supreme Court held the "omnibus" clause (extending insurance coverage to the operation of a vehicle

by a permissive user set out in §28-1170 B 2, A.R.S.

to be a part of "every motor vehicle liability policy."

§28-1170 A, A.R.S. Provides:

"A 'motor vehicle liability policy' as the term is used in this chapter means an owner's or an operator's policy of liability insurance, certified as provided in §28-1168 or §28-1169 as proof of financial responsibility, and issued, except as otherwise provided in §28-1169, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured." (Emphasis supplied)

§28-1168. Certificate of insurance as proof

"A. Proof of financial responsibility may be furnished by filing with the superintendent the written certificate of an insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate shall give the effective date of the motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate the explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

B. No motor vehicle shall be or continue to be registered in the name of a person required to file proof of financial responsibility unless the motor vehicle is so designated in such a certificate."

§28-1169. Certificate furnished by nonresident as proof

"A. A nonresident owner of a motor vehicle not registered in this state may give proof of financial responsibility by filing with the superintendent a

written certificate or certificates of an insurance carrier authorized to transact business in the state in which the motor vehicle, or motor vehicles, described in the certificate is registered, or if the nonresident does not own a motor vehicle, then in the state in which the insured resides, provided the certificate otherwise conforms with the provisions of this chapter, and the superintendent shall accept the same upon condition that the insurance carrier complies with the following provisions with respect to the policies so certified:

1. The insurance carrier shall execute a power of attorney authorizing the superintendent to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state.

2. The insurance carrier shall agree in writing that the policies shall be deemed to conform with the laws of this state relating to the terms of motor vehicle liability policies issued herein.

B. If an insurance carrier not authorized to transact business in this state, which has qualified to furnish proof of financial responsibility defaults in any such undertaking or agreement, the superintendent shall not thereafter accept as proof any certificate of the carrier whether theretofore filed or thereafter tendered as proof, so long as the default continues.

It is the obvious import of these sections that they ave no application to policies other than "certified" nes. The record in this case is devoid of any evidence f such "certification" of appellant's policy.

The Arizona Supreme Court in the Mayflower case did ot hold or even imply that it was therein abrogating any nd all policy defenses theretofore available to insurers

n Arizona. In Mayflower, the Arizona Court followed the ead of the California Supreme Court, the only other court o read into a "non-certified" automobile liability policy he omnibus clause. See Wildman v. Government Employees' ns. Co., 48 Cal.2d 31, 307 P.2d 359 (1957). However, even n California the defense of "non-cooperation" is still avail- ble to the insurer.

Campbell v. Allstate Insurance Company, 32 Cal. Rptr. 827, 384 P.2d 155 (1963);

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999 (1932).

Other cases confirming the validity of the defense of on-cooperation are as follows:

Johnson v. Universal Automobile Insurance Ass'n., 124 S.2d 580 (La. App. 1960);

Adriaenssens v. Allstate Insurance Company, 258 F.2d 888 (10th Cir. 1958);

Stollery Bros., Inc. v. Inter-Insurance Exchange, 15 Ill. App. 2d 179, 145 N.E.2d 768 (1957);

Gabler v. Continental Casualty Company, 295 S.W.2d 194 (Mo. App. 1956);

National Surety Corporation v. Diggs, 272 S.W.2d 604 (Tex. Civ. App. 1954);

Kentucky Farm Bureau Mut. Ins. Co. v. Miles, 267 S.W.2d 928 (Ky. 1954);

Travelers Ins. Co. v. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1950).

7 Am. Jur. 2d 574, Automobile Insurance, Sec. 225 states:

"With regard to a policy of automobile liability insurance voluntarily obtained, the general rule followed by most of the courts is that the breach of contractual provisions relating to acts or omissions

> subsequent to the accident is, in the absence of collusion between insurer and insured, available to the insurer as against the injured person, if, in the circumstances, it would have been available against the insured. In other words, the injured person stands in the shoes of the insured regarding defenses of this character, except in unusual cases where the effect of the insured's failure to comply with the conditions of recovery may be avoided by compliance by the injured person himself."

In this very case, the late Judge Arthur M. Davis expressly rejected appellee's argument and ordered on February 12, 1963, as follows:

> "It is contended that those cases have been modified by 9 ARS Sec. 28-1170. That statute applies only to those motor vehicle liability policies which are certified to the Department of Financial Responsibility as proof of financial responsibility after the happening of an accident. There is nothing in plaintiff's complaint to show that that is the situation between the litigants." (T.R. 86-87)

Cf. cases collected, 31 A.L.R.2d 645; 7 Appleman, Insurance Law and Practice 120, Sec. 4297.

This court has previously recognized the validity under Arizona law of the policy defense of non-cooperation in the case of State Farm Mutual Automobile Insurance Company v. Palmer, 237 F.2d 887, 60 A.L.R.2d 1138 (9th Cir. 1956).

Certainly if the Arizona court in Jenkins v. Mayflower, supra, had taken upon itself to destroy all policy defenses previously available to automobile liability insurers, such

n interpretation would clearly run afoul of the impairment f contract prohibitions of Article 1, §10 of the United tates Constitution and of Article 2, §25 of the Constitu- ion of Arizona, and also of the "due process" provisions f the 14th Amendment to the United States Constitution and rticle 2, §4 of the Constitution of Arizona. Appellant espectfully submits that the court below erred in holding he policy defense of non-cooperation to be abrogated by the ayflower case and that the judgment of the court below should e reversed and the case remanded with directions that judg- ent be entered in favor of appellant.

CONCLUSION

Appellant respectfully submits that the uncontroverted acts presented to the court below establish that before, at he time of, and after the automobile accident from which ppellee's claim arises, appellee was a "member of the family," residing in the same household" as Joel Bailleres, the in- ured, and therefore excluded from the coverage of the liability rovisions of appellant's policy. Therefore, the court below rred in granting appellant's motion for summary judgment and ntering judgment thereon and in failing to grant appellant's otion for summary judgment.

Further, appellant respectfully submits that the court elow erred in its interpretation of the Mayflower case and he Arizona Financial Responsibility law as abrogating the olicy defense of non-cooperation. In awarding judgment in

favor of appellee in the sum of $5,000.00 (the Financial Responsibility limits) rather than the actual $10,000.00 limits of appellant's policy, the court below, of necessity, found Bailleres guilty of non-cooperation which constituted a material and substantial breach of one of the conditions of appellant's policy. However, the court held that such breach was not a defense as to the $5,000.00 financial responsibility limits. Appellant submits that in so doing, the court below erred. Appellant respectfully prays that this court vacate the judgment of the court below, reverse said judgment and remand the case with directions that judgment be entered in favor of appellant and against appellee.

Respectfully submitted,

KENNETH S. SCOVILLE

By _____
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RECEIPT OF SERVICE

Due service and receipt of three copies of the foregoing Appellant's Opening Brief acknowledged this _____ day of _____, 1965.

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20177

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RY WHEELER HOLLEY,	)
Appellant,	)
v.	)
A E. CHEUVRONT, et al.,	)
Appellees.	)

APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE SOUTHERN

DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RY WHEELER HOLLEY, Appellant, v. A E. CHEUVRONT, et al., Appellees.	NO. 20177

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction entertain the petition of a state prisoner for a writ of eas corpus. 28 U.S.C. § 2241a. Such a petition was ed on March 1, 1965.

This court has jurisdiction to review a final er of a judge of the federal district court denying a t when a certificate of probable cause has been filed. U.S.C. § 2253. On May 4, 1965, the petition for eas corpus was denied. A certificate of probable cause

issued by the Honorable Leon R. Yankwich on May 13, 1965.

STATEMENT OF FACTS

It appears from the petition before the lower federal rt and the one presented to the Superior Court of the State California for the County of Madera, that appellant entered lea of guilty to a charge of manslaughter. He was repre- ted by counsel at his arraignment, plea and at the time tence was imposed.

SUMMARY OF APPELLANT'S CONTENTIONS

As we noted in our response to the court below, were not positive just what appellant was asserting as ederal issue. (Response p. 4.) However, it is clear n appellant's opening brief presented to this court t he has but one complaint. He states:

> "The only question here envolved [sic], as to whether or not the appellant is entitled to appeal from the order denying appellant's petition for a Motion to vacate and set aside the judjment [sic] of conviction." (App. Op. Br. p. 3.)

APPELLEES' POSITION

We contend that the lower federal court was correct concluding that appellant is not entitled to a writ of eas corpus and in dismissing Erma E. Cheuvront, Clerk of

era County, as a party respondent.

ARGUMENT

APPELLANT PRESENTS NO FEDERAL ISSUE

Appellant entered a plea of guilty to manslaughter. tence was imposed on November 8, 1963. (Petition p. 2.) or about October 9, 1964, he attempted to file a notice appeal. (App. Exh. E.) His notice was not accepted ause the 10 day appeal period had lapsed. Rule 31(a), if. Rules of Court. Appellant was told how to obtain ief from his default. (App. Exh. E.)

Next, appellant made a motion on October 20, 1964, vacate and set aside his judgment of conviction. This ion was denied in the Superior Court of the State of ifornia for the County of Madera. (App. Exh. C.) He empted to appeal from the denial of his motion. (App. D.) Apparently his notice of appeal was received by Clerk of Madera County after the 10 day appeal period expired. Rule 31(a), Calif. Rules of Court. The rk very clearly told appellant once again how to petition appellate court for relief from his default. (App. Exh. nd letter dated January 20, 1965.)

Appellant's complaint is that the clerk should e accepted his late notice of appeal from the denial of motion to vacate. Under the rules, the clerk was

ole to accept a late notice. That refusal might have
e bearing in determining whether appellant had exhausted
te remedies. It, however, does not in and of itself
sent a federal issue. Appellant does not allege that
has asked an appellate court of this state for relief
n his failure to file a timely notice of appeal. The
lifornia Supreme Court has demonstrated a high degree
liberality in granting such relief.

See People v. Krebs, 62 A.C. 609, 43 Cal. Rptr. 331 (1965);

People v. Curry, 62 A.C. 211, 42 Cal. Rptr. 17 (1965).

Appellant does not assert that he has attempted secure relief from his plea of guilty by filing a petition a writ of habeas corpus with the California Supreme Court from the California District Court of Appeal. Both of se courts have concurrent and original habeas corpus isdiction. Calif. Const. Art. VI, §§ 4 and 4(b).

Obviously he has not exhausted all his presently ilable state remedies. Exhaustion is a prerequisite to ion by this court.

Fay v. Noia, 372 U.S. 391, 435 (1963);

Morehead v. California, 339 F.2d 170, 171 (9th Cir. 1964);

Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964).

Very properly Erma E. Cheuvront was dismissed as

arty respondent. (Order denying petition for writ of eas corpus.) Said party does not have custody of appel- t. A petitioner in habeas corpus seeks his release from custodian. Morehead v. California, supra, 339 F.2d , 171 (9th Cir. 1964). This is just another way of ing that petitioner's complaint does not state a eral issue.

CONCLUSION

There being no merit to appellant's contentions, respectfully request that the decision of the lower court affirmed.

Respectfully submitted,

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/jt
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191
7/65

CERTIFICATE

I certify that, in connection with the preparation this brief, I have examined Rules 18 and 19 of the United ates Court of Appeals for the Ninth Circuit, and that, my opinion, the foregoing brief is in full compliance erewith.

/s/ William L. Zessar
WILLIAM L. ZESSAR

NO. 20176

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY WATKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

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FOR THE NINTH CIRCUIT

LEROY WATKINS,

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NO. 20176

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY WATKINS,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the outhern District of California, Northern Division, for violation of itle 18, United States Code, Section 2421, the White Slave Traffic ct. [C. T. 19]. 1/ Following a jury trial on June 26, 1962, in he District Court for the Southern District of California, Northern ivision, he was convicted and sentenced on June 29, 1962, to two our year terms of imprisonment, the two terms to run consecu-ively [C. T. 24]. No appeal was taken from the above conviction. ppellant filed the subject 2255 motion on February 17, 1965 [C. T.].

/ C. T. refers to Clerk's Transcript.

On February 19, 1965, there was filed and entered by the District Court an order denying what the court referred to as appellant's motion for a Writ of Habeas Corpus ad Testificandum [C. T. 13]. On March 2, 1965, there was filed and entered, by the District Court, an Order Correcting Order dated February 19, 1965, Nunc Pro Tunc [C. T. 16], which Order corrected the title of the February 19, 1965 Order and further, denied the motion made which had been made pursuant to Title 28, United States Code, Section 2255.

The appellant filed, on March 11, 1965, a Notice of Appeal from the Order of March 2, 1965 [C. T. 17].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2421 and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

"A prisoner in custody under sentence of a

court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . . "

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether appellant is entitled to relief in this Court of Appeals upon a ground not urged in the District Court, to wit, whether the prosecution made improper remarks to the jury.

2. Whether there was sufficient evidence to support the conviction on Count One of the Indictment.

3. Whether appellant was denied his right to an appeal from his conviction.

B. Statement of Facts

On December 25, 1961, appellant, in the company of Ruby Nixon, and Gay Hines, made a trip to Phoenix, Arizona, from

resno, California [R. T. 66-67]. [2/] The trio made the trip in an utomobile owned by Emil Kabob, who had placed his car in Ruby ixon's car e [R. T. 77]. Appellant paid for the gasoline used on he trip [R. T. 67], and shared in the driving [R. T. 68].

Prior to making the trip to Phoenix, Nixon overheard a onversation between appellant and Hines revealing that Hines new the location of labor camps to be worked by prostitutes in rizona [R. T. 82-83].

Upon arriving in Phoenix, Arizona, the group picked up renda Joyce Wilson Rogers and proceeded to a labor camp in the hoenix area [R. T. 37, 68]. By charging $5 and $3 per engage- ent, Rogers and Nixon managed to accumulate $300 in "three or our hours" of prostitution [R. T. 68-69, 74-75]. The money arned was handed to the appellant [R. T. 69].

Prior to the trip to Arizona, Nixon had worked as a rostitute for appellant [R. T. 59-60], turning over to him all onies which she earned [R. T. 60, 63].

The following day, December 26, 1964, appellant, in the fore mentioned automobile, returned to Fresno, California, from hoenix, Arizona, in the company of Hines, Rogers and Nixon R. T. 70-71, 36-37]. Again, appellant provided for the expenses f the trip [R. T. 71].

Rogers, like Nixon, had worked as a prostitute for ppellant prior to December of 1961 [R. T. 30], and had also

/ R. T. refers to the Reporter's Transcript of [Trial] Proceedings.

relinquished to him all of her earnings [R. T. 30].

Before leaving Phoenix, there was an understanding that Nixon and Rogers were going to work as prostitutes for appellant in California [R. T. 37]; and, in fact, Nixon and Rogers did engage in prostitution after returning to California, giving the money earned, as before, to appellant [R. T. 37].

IV

SUMMARY OF THE ARGUMENT

Appellant, in his opening brief, has concerned himself with three points.

His first argument states that he was denied his right to a direct appeal from his conviction by the non-feasance of his attorney and the Clerk of the District Court. Relying on Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963), appellant now desires to raise two substantive points, one of which was never presented to the District Court in appellant's subject "2255" motion. Inasmuch as Dodd, id., applies only when there has been prejudice to the defendant, we will concern ourselves with appellant's two substantive arguments prior to reaching the Dodd argument. The two substantive points of appellant did not result in any prejudice and, therefore, his first is moot.

Appellant's second argument is concerned with an alleged insufficiency of the evidence. Appellant contends that the "purposes" of the trip as referred to in Count One of the Indictment were not

roven. Judge Crocker's order, the denial of which is the sub-
ect of the instant appeal, amply demonstrates that the defendant's
ip from Fresno, California, to Phoenix, Arizona, was for the
legal purposes charged in the Indictment.

Appellant's third argument relative to closing argument
f Government counsel, was not even presented to the District
ourt in appellant's 2255 motion or otherwise, and, therefore,
ay not be considered on this appeal. We note that in his 2255
otion, appellant raised a point pertaining to the Escobedo
octrine, which point he has abandoned on this appeal.

V

ARGUMENT

A. APPELLANT'S CONTENTION OF ERROR RESPECTING GOVERNMENT COUNSEL'S ARGUMENT TO THE JURY, AT TRIAL, IS NOT PROPERLY BEFORE THIS COURT

Appellant's argument, beginning at page 6 of his opening
rief, is not ripe for review by this Court. The ground presented
or consideration in the opening brief was not presented to the
istrict Court in the 2255 motion; nor for that matter was such
n issue preserved for consideration even if there had been a
irect appeal, there not having been a timely trial objection. The
ppellant's motion to vacate sentence was concerned only with
ufficiency of the evidence and whether he had been advised by the
BI agent, prior to an admission, of his constitutional rights.

The Reporter's Transcript, at pp. 99-100, as noted by Judge Crocker in his order denying the 2255 motion, shows clearly that appellant was so advised of his rights.

Since appellant's allegation of an illegal commenting on the evidence was not raised below, it may not be passed upon by this Court. A point cannot be raised for the first time on an appeal from a denial of a motion pursuant to Title 28, United States Code, Section 2255.

Standley v. United States, 318 F. 2d 700 (9 Cir. 1963), cert. den. 376 U. S. 917 (1964), reh. den. 376 U. S. 967 (1964);

Smith v. United States, 287 F. 2d 270 (9 Cir. 1961), cert. den. 366 U. S. 946 (1961).

Appellant can be afforded no relief on this appeal relative to a belated attack on a comment upon the evidence.

B. THERE WAS SUFFICIENT EVIDENCE OF PROHIBITED "PURPOSES" TO SUSTAIN THE CONVICTION OF COUNT ONE OF THE INDICTMENT.

The purpose of appellant's trip to Arizona in December of 1961 is clearly demonstrated by the evidence.

Prior to leaving for Arizona, appellant had a discussion with Gay Hines, in Fresno, California, concerning labor camps that could be "worked" by prostitutes in Arizona [R. T. 82-83]. Upon appellant's arrival in Arizona, he proceeded forthwith to

uch a labor camp and the women with him, one of whom he had rought from Fresno, engaged in acts of prostitution, giving to ppellant all of the money they earned, as they had done in the ast [R. T. 37, 68]. Both before and after the trip to Arizona, oth girls worked as prostitutes for appellant, he receiving from hem all of their earnings [R. T. 30, 37, 60, 63]. The pattern as consistent, only the location of their prostitution activities hanged.

The jury was certainly entitled to infer, from the above vidence, that the dominant purpose of the subject trip was for he purpose of prostitution.

C. APPELLANT'S CONTENTION THAT HE WAS DENIED THE RIGHT TO APPEAL FROM HIS CONVICTION IS MOOT SINCE HE DID NOT SUFFER "ANY PREJUDICE" AND WAS NOT THE VICTIM OF "PLAIN REVERSIBLE ERROR IN THE TRIAL."

The District Court's order denying the subject motion roperly decided the matter. Dodd v. United States, 321 F. 2d 40 (9 Cir. 1963), is perplexing to the reader for several easons. First, "plain reversible error" is mentioned as the tandard that must be shown before a court will give relief nder Section 2255 in a situation where no direct appeal has een taken on issues not otherwise properly within a 2255 motion. Second, "any prejudice" is mentioned as the standard. In the nstant case as shown in our previous argument neither plain

reversible error, nor any prejudice has been shown.

If this Court were to find that either "plain reversible error" or "any prejudice" has been shown on any of the substantive issues contained in appellant's 2255 motion, then the matter should be remanded to the District Court for findings as to whether there was or was not an "intentional relinquishment of petitioner's right of appeal." Dodd, supra, at 246. In order to erase any ambiguity, the appellee maintains that "any prejudice" should not be the standard employed. Cf., Thomas v. United States, 343 F. 2d 49 (9 Cir. 1965).

It is submitted that remand is not necessary because there has been no showing of substantive error of any kind.

CONCLUSION

There being no error in the denial of appellant's motion, the judgment should be affirmed.

Respectfully submitted,

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JOHN K. VAN DE KAMP
Assistant United States Attorney
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Attorneys for Appellee
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW
Assistant United States Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UWAMIE TOMIYASU and KIYO TOMIYASU,	)	
Appellants,	)	
-vs-	)	Civil Appeal No. 20175
RICHARD GOLDEN and AUDREY Y. GOLDEN,	)	
Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA.

APPELLEES' ANSWERING BRIEF

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FILED

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UNITED STATES COURT OF APPEALS

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA.

APPELLEES' ANSWERING BRIEF

STATEMENT OF PLEADINGS AND JURISDICTION OF THE COURT

Appellants filed their complaint on July 21, 1964, to void the sale of real property under a deed of trust and to set aside the trustee's deed. (R. 1-13.) Respondents-Appellees' answer, filed August 10, 1964, denied generally the allegations set forth in the complaint, and set up the defense of res judicata. (R. 14-17) Appellees' motion for

summary judgment was granted and judgment entered thereon on March 5, 1965. (R. 149-150.) Notice of Appeal to the Ninth Circuit Court of Appeals was filed April 6, 1965. (R. 151.)

STATEMENT OF THE CASE

Appellants' claim for relief in the instant proceeding is asserted in paragraph XI of their complaint as follows:

> "That the sale of said lands under the conditions as hereinabove set forth constituted, without notice, violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. 4.)

To reach this issue, it is necessary to set forth certain facts relating to the prior litigation had between appellants and appellees in the state court and the Supreme Court of the State of Nevada.

Appellants, together with their father, were vested with title to certain real property in Clark County, Nevada. (R. 1-2.) In 1958, they executed a second deed of trust on said property to secure the payment of a promissory note. (R. 58.)

Thereafter, appellants and their father defaulted in the payment of said note. (R. 9.) Under the terms and conditions of the second deed of trust, the trustee was directed to sell at public auction said real property. (R. 9, 59.)

The appellees were the successful bidders at the trustee's sale and upon payment of the bid price, the trustee conveyed the real property to the appellees by trustee's deed dated April 27, 1962. (R. 11-13.)

Appellants and their father filed their first action in the Eighth Judicial District Court, Clark County, Nevada, to set aside the trustee's sale and to cancel and annul the trustee's deed. (R. 21-42.) Following trial, the state district court entered judgment in favor of appellants and their father (R. 52-56), and appellees appealed from that judgment to the Supreme Court of the State of Nevada.

The Supreme Court reversed that judgment, denying relief to appellants. (R. 78.) The opinion of the Nevada Supreme Court is reported in Golden v. Tomiyasu, 79 Nev. 503, 387 P. 2d 989. (Appendix A.)

The appellants and their father then commenced a second action against the appellees and six additional defendants in the Eighth Judicial District Court, Clark County, Nevada, asserting as their claim for relief that the trustee's sale be declared null and void and that the trustee's deed be set aside and declared null and void, together with general and punitive damages. (R. 96-111.)

The appellees, in the second action, moved the state trial court for summary judgment, arguing that the former judgment was a bar to the second action under the doctrine of res judicata. The trial court granted appellee's motion and entered summary judgment in favor of appellees. (R.119-120.)

Appellants and their father appealed from that judgment to the Supreme Court of the State of Nevada. The Supreme Court affirmed. Its opinion is reported in 81 Nev. _____, 400 P. 2d 415 (1965).

On July 27, 1965, appellants and their father filed in the Supreme Court of the United States their petition for a writ of certiorari to the Supreme Court of the State of Nevada, for review of the final judgment in the second action.

On October 11, 1965, the Supreme Court of the United States denied the petition for a writ of certiorari. Tomiyasu v. Golden, U. S. Oct. 11, 1965, No. 401.

On July 21, 1964, appellants filed their complaint in the United States District Court for the District of Nevada, to again set aside the trustee's sale of the real property and to set aside and declare null and void the trustee's deed to appellees. (R. 1-13.)

In this action, the appellants predicated their claim for relief upon the ground that "the sale of the lands ..., without notice, violated the due process clause of the Fourteent Amendment to the Constitution of the United States.". (R. 4, lines 28-31.)

The appellees moved the United States District Court for summary judgment, arguing that the prior state court judgment was a bar to this action under the doctrine of res judicata. (R. 18-122.) On March 5, 1965, the United States District Court for the District of Nevada granted said motion and entered judgment thereon. (R. 149-150.) Appellants have appealed that judgment to this court.

One question is presented:

Does the final judgment of a court of concurrent jurisdiction preclude appellants from relitigating the same issues and what is substantially the same cause of action?

ARGUMENT

Appellants raised the issue of "notice" in their complaint filed June 14, 1962, in the first state court as follows:

> "VII. . . .
>
> "(a) That the notice of breach and election to sell under deed of trust dated the 10th day of November, 1961 was not given to Kiyo and Uwamie Tomiyasu; (R. 26, lines 27-30.)
>
> . . .
>
> "(l) That the notice of sale of said property, particularly that portion thereof describing said property, was not noticed for twenty (20) days successively in three public places of the township where the property was located, and where the property was to be sold.
>
> . . ." (R. 29, lines 23-28.)

This issue was litigated and the Supreme Court of the State of Nevada resolved the issue against appellants, holding that the trustee's sale on foreclosure under the deed of trust was valid and made in accordance with the terms of said deed of trust and the statutes of the State of Nevada. Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989. (Appendix A.)

More particularly, the Supreme Court said at page 992, (Appendix A, page 10):

> "(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute."

And again, at page 992, (Appendix A, page 11):

> "(6) . . . The trustee gave every notice required by the terms of the trust deed and by the statute."

The appellants now argue, however, through the affidavit of Uwamie Tomiyasu, one of the appellants, that she did not receive notice of the foreclosure proceedings, did not participate in any of the proceedings, that she was not an

actual party litigant in the first state court action, nor did she appear at said trial, either in person or by an attorney. (R. 141-143.)

She does admit, however, that the deed of trust was executed on her behalf by her father, Bill Tomiyasu, as her attorney in fact. (R. 142.)

On September 28, 1946, each appellant executed a general power of attorney appointing their father, Bill Tomiyasu, as their true and lawful attorney. Each power of attorney was duly recorded on October 22, 1946, in the official records of the recorder of Clark County, Nevada, bearing document numbers 236879 and 236880. (Supp. Record.) Both powers of attorney remain in effect and have not been revoked of record. The Clark County, Nevada, Recorder's Certification of this fact was presented to the trial court. (Supp. Record.)

Each of appellants power of attorney is general in terms and unambiguous in construction. Maynard v. Mercer, 10 Nev. 33 (1875).

Nevada Revised Statutes provide that an instrument

relating to or effecting real property may be subscribed by lawful agents.[1]

The argument of appellants that Uwamie Tomiyasu was not a party litigant nor did she appear in the first state action in person or by an attorney is specious. Her attorney of record in this proceeding was and is the same attorney who appeared for and represented appellants since the inception of the state court litigation which commenced June 14, 1962. (R. 21.) By his own affidavit, appellants' attorney states, "That he is attorney of record for the [appellants] herein and that he was attorney of record for the [appellants] in that certain Case No. 117703 in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, between Bill Yonema Tomiyasu, Kiyo Tomiyasu, Uwamie Tomiyasu and Nanyu Tomiyasu, plaintiffs, vs. Richard Golden and Audrey Y. Golden, defendants.". (R. 137.)

1 NRS 111.020. "Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by the lawful agent of the party."
NRS 111.280 provides for the form of acknowledgment by an attorney in fact.
NRS 111.330 provides that no power of attorney is deemed revoked until an instrument containing such revocation is recorded. Additionally, a negotiable promissory note may be executed by a duly authorized agent. NRS 92.026.

If, in fact, this appellant has any cause to complain for this representation, she should lodge it against her attorney of record. And if her attorney in fact acted improperly, she has her remedy.

Appellees contend that there is no genuine issue as to any material fact and that the granting of their motion for summary judgment under the doctrine of res judicata was proper. The issue of "notice" was litigated and resolved against appellants. Golden v. Tomiyasu, supra.

In Schroeder v. 171.74 Acres of Land, etc., 318 F.2d 311 (8th Cir. 1963), the court stated at 314:

> "Generally stated, under the doctrine of res judicata an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. (citing cases and texts.)
>
> "The doctrine is but a manifestation of the recognition that endless litigation leads to chaos;

that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquillity requires that the matter be at an end. (Citing cases.) . . ."

This Court, in the case of Lineker v. Marshall, 7 F.2d 875, 878 (9th Cir. 1925), in affirming the district courts ruling in sustaining the plea of res judicata by reason of a state court judgment held:

". . . Whether these questions were rightfully determined in the state court is not for us to say. We are not a court of appeal authorized to correct the judicial errors charged against the state court in this case. We are only authorized at this juncture to determine whether the rights asserted by the plaintiff, in his complaint, have been judicially determined as between the same parties or their privies by a competent tribunal in another proceeding. If they have, and it so appears in the record, the case is at an end in this court."

See also Rubens v. Ellis, 202 F. 2d 415, 418 (5th Cir. 1953).

In Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F. 2d 106, 111 (9th Cir. 1960), this Court had occasion to consider the Nevada cases involving the plea of res judicata. That decision is cited by the Supreme Court of Nevada when it sustained the ruling of the trial court in the second state court action. Tomiyasu v. Golden, 81 Nev. ____, 400 P.2d 415, 416.

The federal court is bound by state court decisions regarding rights of property and other matters of local law. Dayton & Michigan R. Co. v. Commissioner of Int. Rev., 112 F.2d 627, 630 (4th Cir. 1940). Similarly, in General Trading Co. v. State Tax Comn. of Iowa, 322 U. S. 335, 64 S.Ct. 1028, the United States Supreme Court held that "The application by [the Iowa Supreme Court] of its local laws and the facts on which it founded its judgment are of course controlling here.".

The appellants in their opening brief for the first time raise as an additional issue the validity of a Nevada statute. (Appellants' Opening Brief, 1-3.) The validity of

the statute was not raised by the appellants' pleadings in the United States District Court for the District of Nevada. (R. 1-13, 134-143.) Nor was the validity of the statutes questioned in argument or otherwise made an issue. It has long been the law and axiomatic in this circuit that a litigant cannot present issues or arguments on appeal that were not presented to the trial court. Union Pacific Railroad Company v. Johnson, 249 F.2d 674, 677 (9th Cir. 1957); Carr v. City of Anchorage, 243 F.2d 482 (9th Cir. 1957); United States v. Marshall, 230 F.2d 183 (9th Cir. 1956); In-Man Poulsen Lumber Co. v. Commissioner of Int. Rev., 219 F.2d 159 (9th Cir. 1955); Fanchon & Marco, Inc. v. Paramount Pictures, 215 F.2d 167 (9th Cir. 1954); United States v. Waechter, 195 F.2d 963 (9th Cir. 1952).

There should be an end to this litigation. The Appellants have had their day in court. As the Supreme Court of the United States announced in Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 51 S.Ct. 517 (1931):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest; and

that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States District Court for the District of Nevada be affirmed.

Respectfully submitted,

BABCOCK & SUTTON

By:
Howard W. Babcock
Attorneys for Appellees
Suite 105, Friedman Building
300 Fremont Street
Las Vegas, Nevada.

Date: October 18, 1965.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United

States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD W. BABCOCK,
Attorney for Appellees.

PROOF OF SERVICE

RECEIPT OF three (3) copies of Appellees' Answering Brief are hereby acknowledged this 19th day of October, 1965.

HARRY E. CLAIBORNE, Esq.
108 South Third Street
Las Vegas, Nevada
Attorney for Appellants.

APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF NEVADA

RICHARD GOLDEN and AUDREY Y. GOLDEN, Appellants, v. BILL YONEMA TOMIYASU, KIYO TOMIYASU, UWAMIE TOMIYASU, and NANYU TOMIYASU, Respondents.

No. 4625

led December 23, 1963)

Appeal from judgment of the Eighth Judicial District Court, rk County; George E. Marshall, Judge.

REVERSED.

BABCOCK & SUTTON, of Las Vegas, for Appellants.

HARRY E. CLAIBORNE, of Las Vegas, for Respondents.

OPINION

By the Court, Badt, C.J.:

This was an action to set aside a trustee's sale on fore-sure of a deed of trust. We hold that mere inadequacy of ce, without proof of some element of fraud, unfairness or ression as accounts for and brings about the inadequacy of ce, is not sufficient to support a judgment setting aside sale.

The Tomiyasus had executed a second deed of trust to a

ustee to secure the payment of $13,564 to the predecessors
d assignors of the First National Bank. This was subject and
ordinate to a first deed of trust in the sum of $38,968.29.
default of the second deed of trust the trustee, pursuant to
mand of the bank as beneficiary, proceeded to sell the proper-
under the powers of the second deed of trust. A public sale
s had, at which the Goldens became the purchasers for the sum
$18,025.73. The Tomiyasus, trustors, commenced this action
the court below to set aside the trustee's sale and to cancel
d annul the deed executed pursuant thereto and tendered into
urt the amount of the purchase price and offered to pay any
crued costs. Such tender was made with the filing of the
mplaint on June 14, 1962, some 50 days after the sale.

The case was tried to the court without a jury. The court
dered judgment as prayed, setting aside the sale and annulling
e deed and ordering the clerk of the court to pay to the Goldens
e amount deposited by the Tomiyasus. This appeal followed.

The learned trial judge filed a written decision in which
reviewed each of the reasons advanced by respondents, why the
le should be set aside. Each of such reasons was rejected by
e court as being sufficient in itself to require the setting
ide of the sale, but stated that the reasons asserted and

iscussed in the opinion "do indicate that because of voluminous irregularities" the sale must be set aside.

Following the recitals contained in the decision, the court irected findings to be prepared, and signed the formal findings, ncluding findings XVI and XVII which had not been mentioned in he findings contained in the written decision. The added findngs are as follows:

"XVI. The court finds that the irregularities and confusion heretofore mentioned would have been, and was misleading, to prospective bidders, and would have discouraged, and did discourage, the attendance of prospective bidders at the sale, which could have, and did, result in the property being sold for an inadequate price to the injury of the trustors.

XVII. The court finds that the trustee, Nevada Title Insurance Company, their agents and employees, in exercise of their power under the trust deed, was an agent of both parties and it was its duty on making the sale to act in good faith and a just and fair discretion in protecting the rights and interests of the trustors with all reasonable effort to make the sale beneficial to such parties by obtaining the full value of the property, or the best price possible,

or a reasonable amount, but intentionally, or unintentionally, failed in its said duty in that regard in the manner hereinabove mentioned in these findings."

Although the evidence is in conflict, there is substantial ort of the court's finding that the land has a market value 2,500 an acre. As five acres had been released from the deed rust, there remained approximately 80 acres valued at a total pproximately $200,000. As against the inadequacy of the bid 18,025.73 as compared with this valuation, the following facts ld be noted:

(1) The deed of trust here involved was subject to a lien prior deed of trust in the sum of $38,968.29.

(2) Said first deed of trust called for monthly payments of .00 each.

(3) The Tomiyasus became delinquent in their payments on first deed of trust to the extent that the First National Bank, ficiary under the second deed of trust, was compelled to ad-e, up to the time of the foreclosure sale, the sum of 09.52. The total under the two deeds of trust amounted to oximately $57,000.

(4) The Tomiyasus were in continual default also in payments

f the second deed of trust - the sum secured thereby having ncreased to $18,024.73 from the original indebtedness of $13,564.

(5) On October 26, 1961, the First National Bank, bene- iciary under the second deed of trust, notified Nevada Title nsurance Company, the trustee, that the trustors were in default, that the last payment on the principal had been paid in Octo- er, 1960, and interest had been paid only to March 11, 1961. ccordingly, the trustee was instructed to prepare notice of de- ult and election to sell in accordance with the provisions of e deed of trust. Copy of the bank's said letter was mailed to ll Yonema Tomiyasu. The notice of breach and election to sell re duly recorded as required by the deed of trust. Publication notice of trustee's sale was duly made and notice that the blication was running was mailed to Bill Yonema, said sale ing noticed for March 13, 1962, at 10 a.m., at the front trance of the Nevada Title Insurance Company.

(6) From September to November, 1961, Bill Yonema (the father) s absent in Japan and handed the management of the property over his son, Nanyu, who continued such management but kept his ther fully advised. Bill Yonema knew of the delinquency, the minence of foreclosure, the receipt of the notices from the ustee, and they made various attempts to refinance the loan

through other sources.

(7) The advertised sale was postponed on seven separate occasions, the final sale date being April 25, 1962. Each of such postponements was for the benefit of the Tomiyasus, who were making constant efforts to raise the necessary funds. Each postponement was proclaimed from the front door of the trustee's office. On none of these occasions did any other buyers appear. If on some of these occasions the trustee waited an additional ten or fifteen minutes before proclaiming the postponement, this cannot be termed even an irregularity. Its actual effect was to give further opportunity for bidders to appear.

(8) At the sale the agent of the trustee read the notice of the sale but when he came to the description, gave a general description of the four parcels without reading the lengthy description of the legal subdivisions, which description appears in the record as some two and one-half typewritten, legal-sized pages. All parties present knew exactly what land was being sold. He announced that, with the consent of those present, he would use that method. No objection was voiced. After reading the notice he explained that five acres had therefore been released from the deed of trust.

(9) The First National Bank, beneficiary, bid the amount its debt, $18,024.73. The Goldens bid a few cents more and e trustee suggested that their bid should be at least $1 more, they bid $18,025.73. There were no further bids and the prop- ty was knocked down to them for their bid.

(10) They went into the trustee's office and Mrs. Golden ote out a personal check on the First National Bank for the ount bid. The trustee telephoned the bank and asked if it uld honor said check and was advised that it would. The ustee thereupon accepted the same. At the bank this check, ich was made payable to the trustee, was replaced by a cashier's eck to the trustee which then drew its own check in favor of the nk, the beneficiary.

The learned trial judge held that inadequacy of price anding alone would not be sufficient to justify setting aside e trustee's sale. He also stated that the failure of the ustee to sell for cash standing by itself would seem to have ttle merit. He also noted that the sale en masse and not in parate parcels was no irregularity, as it was within the dis- etion of the trustee and that in any event he could have re- ived no bid if he offered the property in separate parcels. noted the claim of irregularity in the fact that the des-

ription did not list the water well, buildings, plants, trees, nd shrubbery, and was therefore inadequate. As to this, the otice of sale used the same description as that contained in he deed of trust and which also included the appurtenances.

Reference has been made to the court's rhetorical questions nd its review of certain circumstances. It thought that the bid f the First National Bank of $18,024.73 should have been accepted. t asks, "Why did Mr. Adams (the vice-president and agent of the rustee) advise Mrs. Golden to increase her bid?" This could ardly be characterized as an increase. Over $18,000 in round igures, it brought the bid to $18,025.73 instead of $18,024.73. Why did they accept a check in the amount of $1.00 more than he mortgage holder had bid?" These matters hardly require rgument or answer, as the court frankly followed with this tatement: "These matters do not readily convince the court hat anything was wrong * * *." This in turn, however, is qualified by doubts in the court's mind as to why the trustee presumed o give the Goldens any advice. The court then ponders the uestion as to a possible right of redemption from the bank, hich was foreclosed by the action of the trustee and the cooperation of the defendants." As to this, the court again emarks: "This item, standing alone, would be of no particular

consequence but, however, as we pass on, other comments will develop." The court then turns to the value of the land as $2,500 per acre and the sundry postponements of sale, and asks the one salient question: "Was the sale calculated to make it possible for (the Goldens) to bid without competition?" This is apparently the sole irregularity that the court did not itself dispose of.

As noted, the court's formal finding No. XVI was that irregularities in the postponements of the sale were "misleading, to prospective bidders, and would have discouraged, and did discourage, the attendance of prospective bidders at the sale, which could have, and did, result in the property being sold for an inadequate price to the injury of the trustors." An intense examination of the entire transcript reveals that there is not a word of testimony to support this finding. During the oral argument counsel for the respondents was asked by members of this court to point to anything in the record indicating that any irregularity in the matter of any of the postponements or the proclamation thereof had any such effect or any effect damaging or prejudicial to the respondents. Counsel's reply was that the inadequacy of the price received was the damage, but was unable to point out any damage or disadvantage or harmful effect by way

of preventing or discouraging the attendance of prospective bidders. As noted heretofore, no bidders, other than the parties now before the court, appeared at the original time set for the sale or at any of the postponements.

We are compelled to dispose of the various grounds on which respondents attempt to support the judgment as follows:

(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute.

(2) As to asserted irregularities in the sundry postponements of the sale--even assuming such irregularities--every postponement was made for the benefit of the trustors and there was no evidence that any bidders were deterred from bidding or appearing.

(3) As to the attack on the trustee's sale of the property en masse, this was entirely within the discretion of the trustee, NRS 107.030 (6), (incorporated by reference in the deed of trust), Py v. Pleitner, 70 Cal.App.2d 576, 161 P.2d 393, was pursuant to the terms of the deed of trust and the statute, and was made with the consent of all persons present.

(4) As to the release of the five-acre parcel as noted when

the notice of sale was read, we can see no prejudice to any party involved. The five acres were released to the attorney for the Tomiyasus.

(5) As to the acceptance of the bidder's check in place of the cash sale required, it was immediately determined that the First National Bank, which was also the beneficiary, advised that it would honor such check, and it did so on presentation. No objection was made.

(6) As to the conduct of the trustee, the record is devoid of any evidence supporting the finding that "intentionally, or unintentionally, (it) failed in its said duty * * * to act in good faith as an indifferent person, exercising good faith and a just and fair discretion in protecting the rights and interests of the trustors with all reasonable effort to make the sale beneficial to such parties by obtaining the full value of the property, or the best price possible, or a reasonable amount * * *." The trustee gave every notice required by the terms of the trust deed and by the statute.

(7) The learned trial judge apparently thought, and respondents urge, that there was something suspicious in the fact that the trustee notified the Goldens of the sale and notified

no other parties. But the Goldens, and no other parties, had asked for this information. In any event, the Goldens' bid inured to the benefit of the trustors.

(8) This leaves as our sole consideration the question whether the inadequacy of the price standing alone justified the setting aside of the sale. Respondents contend that when the inadequacy is so great as to shock the conscience, this is sufficient justification for the judgment. Respondents rely for this conclusion on the statement contained in 59 C.J.S., Mortgages § 601, at 1055-1057; "The inadequacy of the price, in order to furnish a basis for setting aside or voiding the sale, must be gross, and such as to shock the conscience of the court, or to suggest fraud, misconduct, or the like. The inadequacy, if any, must be determined on the basis of the real value of the land at the time of the sale and its relation to the total debt against the property, and the sale will not be set aside where there is a substantial dispute as to the market value of the property or as to the fairness of the price paid. On the other hand, where the price realized at the sale was so grossly inadequate as to shock the conscience, it may by itself raise a presumption of fraud, trickery, unfairness, or culpable mismanagement, and

therefore, be sufficient grounds for setting the sale aside. In the final analysis, the question whether the price was grossly inadequate necessarily depends on the peculiar facts of the given case." Respondents also quote the following:

"At page 1056, 59 C.J.S., Mortgages §601, it is said:

'In the case of a very great disparity, the Court will be astute to extract from the facts of the case sufficient to justify it in annulling the sale by reason of mistake, surprise, unfair conduct, or the like.'"

The foregoing is just a part of a very lengthy section. Many cases are cited in the footnotes. We have studied a vast number of these cases, as well as the cases cited in A.L.R., Annot., 8 A.L.R. 1001, under the title "Sale under power in mortgage or trust deed as affected by inadequacy of price." The rule as there stated is the one cited by the learned trial judge: "Mere inadequacy of price alone is not sufficient to invalidate the sale of land under a power in a mortgage or deed of trust." In support, many cases are cited where the inadequacy of price was far greater than appears here. In the present case, accepting the court's conclusion that the value of the land was $2,500 an acre or an aggregate in round figures of $200,000 as against

the aggregate debt evidenced by the first and second deeds of trust of approximately $57,000, the property sold at approximately 28.5 percent of its value. The A.L.R. note cited refers to numerous cases in which the property was sold for a far smaller proportion of its value than 28.5 percent, in which cases the court refused to invalidate the sale. The cases cited are too numerous to discuss. It is true, as asserted by respondent, that many cases in approving the rule that mere inadequacy standing by itself is not sufficient to set aside the sale, qualify it by saying, "unless the inadequacy is so gross as to shock the conscience." In a few jurisdictions the rule is expressed that mere inadequacy of price is not sufficient to set aside a sale unless it be so gross as to raise the inference of fraud or imposition, or similar language. However, a study of the cases indicates that the courts in thus parroting the rule had no occasion to insert the shock-the-conscience clause in the particular cases under consideration, and such quotation appeared in virtually every case to be pure dictum, as there were other elements indicating fraud or imposition on the debtor, or such irregularities as would throw doubt on the good faith of the trustee.

The reason for the insertion of such clauses seems clearly

to be that courts of equity are averse to tying their hands against equitable relief whenever it might seem justifiable. It is not strange to find courts of equity thus desiring to protect themselves. They should, however, not feel under such necessity. Each case is precedent only under the facts of that case. Here we find scores of cases refusing to grant relief upon the ground of inadequacy of price alone. It should be unnecessary to qualify such holding by saying that they will not be bound to it when other factors exist.

Indeed the same language was used by this court in Dazet v. Landry, 21 Nev. 291, 298, but it was entirely unnecessary to the decision itself and was pure dictum. The case involved the propriety of a sheriff's sale of mining property to the second highest bidder. The appellant had bid $8,500., but not having the cash, asked for 15 minutes' time to get the money. This was granted and the sheriff requested in the presence and hearing of the plaintiff that all bidders and bystanders remain, as there would be no sale until the plaintiff's return within the time mentioned with the money to make his offer good. The people did remain and the sheriff waited 30 minutes, and as the plaintiff did not return, proceeded to resell the property and sold it to one Lacrouts for $6,100, the highest bid. This court held that no

fraud or collusion was shown to exist between the officer and any bidders, and this court affirmed the sale to Lacrouts. It will readily be seen that there was no occasion to refer to the "shock-the-conscience theory."

The early case of Runkle v. Gaylord, 1 Nev. 123 (Vol. 1-2 Nev. 100) (1865), is discussed in the A.L.R. annoutation 8 A.L.R. 1001,1010, and refers to a private sale. The court's language was quoted as follows:

> To say that mortgagee with power to sell, who has an incumbrance on the estate of less than one-third of its value--an incumbrance which five or six months' rent will discharge--has the right to sell the estate absolutely to the first man he meets who will pay the amount of incumbrance, without any attempt to get a larger price for it, would in our opinion be equivalent to saying fraud and oppression shall be protected and encouraged."

Before using this language the court had reviewed at length facts indicating collusion and fraud. The headnote referred to the purchaser as one "who knows the mortgagee is sacrificing the property, selling it at a small fraction of its value, and that, too, when (the mortgagee) could collect his debt out of the rents in from two to five months without sale, is not an innocent vendee, and will not be protected in his purchase."

In the present case counsel for respondents, in oral argument, stated that he did not claim fraud or conspiracy but only collusion between the trustee and the high bidder. This did not exist.

Respondents insist that there is no divergence in the authorities to the effect that a judicial sale will be set aside for inadequacy of price alone when such inadequacy is so gross as to shock the conscience. Six cases are cited in support of this contention. They are cited in the margin.[1] In each of such cases the inadequacy in price is coupled with fraud, unfairness, concealment, oppression, or other satisfying grounds to warrant the court in its judgment setting aside the sale. Such being the case, the recital of the rule relied on by respondents is dictum.

To discuss the hundreds of cases involving attacks on public sales by trustees under the powers of a deed of trust where inadequacy of price is claimed, with or without the additional elements of fraud, would be neither necessary nor desirable. We adopt

[1] Foge v. Schmidt, 101 Cal.App.2d 681, 226 p.2d 73; Gandy v.Cameron State Bank, 2 S.W.2d 971 (Tex. 1927); Linney v. Normoyle, 145 Va.589, 134 S.E. 554; Jackson v. Fuller, 85 F.2d 816,819; Winbigler v. Sherman, 175 Cal.270, 165 P.943; Bank of America Nat. Trust & Savings v. Reidy, 15 Cal.2d 243, 101 P.2d 77.

the rule laid down in Oller v. Sonoma County Land Title Company, 137 Cal.App.2d 633, 290 P.2d 880. There the suit to set aside the sale contended "that the foreclosure proceedings were improper; that the trustee was guilty of bad faith; and that the trustee was guilty of bad faith; and that the property was sold for a grossly inadequate price." The court held that when the offer "at the time and place fixed in the original notice of sale and without further publication and posting by oral proclamation, postponed the sale to a definite future date, he was acting validly within the express provisions of the deed of trust," and that "'no other notice of postponed sale need be given.' Since the rule in this state is so well established, any discussion of the cases from other jurisdictions cited and relied upon by plaintiffs' counsel would appear unnecessary." The court then referred to the inadequacy of the consideration and said: "However, even assuming that the price was inadequate, that fact standing alone would not justify setting aside the trustee's sale. 'In California, it is a settled rule that inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as

ccounts for and brings about the inadequacy of price.'"
everal earlier California cases are cited. The allegation of
alue was $25,000 and the testimony as to value was conflicting.
he sale price was $5,025. (In approving the rule thus stated,
e necessarily reject the dictum in Dazet v. Landry, supra,
mplying that the rule requiring more than mere inadequacy of
rice will not be applied "if the inadequacy be so great as to
hock the conscience.")

One of the cases relied on in Oller v. Sonoma County Land
itle Company, supra, is Odell v. Cox, 151 Cal.70, 90 P. 194,
n which the Supreme Court of California, after citing many cases,
aid: "The effect of this rule is that where such inadequacy
tands alone, unaccompanied by any unfairness or other inequi-
able incident, it will not authorize the vacating of the sale.
ut it is universally recognized that inadequacy of price is a
ircumstance of greater or less weight to be considered in
onnection with other circumstances impeaching the fairness of
he transaction as a cause of vacating it, and that where the in-
dequacy is palpable and great, very slight additional evidence
f unfairness or irregularity is sufficient to authorize the
ranting of the relief sought. * * * We think there can be no

doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage,' resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault." (Emphasis supplied.)

The California Supreme Court referred to Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686, 29 L.Ed. 839, supporting the rule of gross inadequacy if, in addition, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any reason misled or surprised.

It also referred to Schroeder v. Young, 161 U.S.334, 16 S.Ct. 512, 40 L.Ed. 721, an appeal from the judgment of the Supreme Court of the Territory of Utah affirming the decree of the territorial trial court setting aside a judicial sale. Mr. Justice Brown, delivering the unanimous opinion of the United States Supreme Court, said:

> While mere inadequacy of price has rarely been held

sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price,--the sale may be set aside, and the owner may be permitted to redeem." (Emphasis supplied.)

After reciting numerous acts of oppression and fraud, the opinion goes on as follows:

"There are other circumstances also found by the court below, which, taken in connection with the grossly inadequate price paid, render it still more inequitable that purchasers

standing in the position of the defendants in this case should insist upon the letter of the bargain, and throw something more than a mere doubt upon the fairness of the transaction." (Emphasis supplied.)

Texas observes the same rule. In Klein v. Glass, 53 Tex. 37, court's final conclusion was: "We do not think, under the timony as presented by the record, that there was any such ud, irregularity, or unfairness in the sale as would authorize to set it aside for inadequacy of price." The sale brought 0. The value of the property sold was $2,000.

It will be recalled from our statement of the facts that court below rejected all claims of fraud and collusion except instance of the Goldens' coming into the sale by reason of information given them by the trustee and their bidding one lar more than the bid on behalf of the beneficiary. It is te evident, however, that this created simply a suspicion in court's mind. During the oral argument counsel for respondents avowed any claim that there was fraud or comspiracy. He stated t all he claimed was that there was collusion between the stee and the Goldens. It would seem to us that for the trustee bring another bidder to the sale could result only in benefit

the trustors. With the case of the Goldens it resulted in ising the bid only one dollar. The beneficiary under the deed trust naturally bid only the amount of its debt, particularly the realization that it was only buying the equity subject to e first mortgage. When the Goldens raised the bid, the bene- ciary was not called upon to make a further bid. Nothing in e case warrants a conclusion of collusion to defraud the miyasus. There is no support for the trial court's intimation at there would have been a right of redemption as against the nk but not as against the Goldens.

To sum up, respondents seek to support the judgment by upling inadequacy of price with one or all of the following:) insufficiency of the notice of sale - but this was given rictly in accordance with statute; (2) the several postponements the sale - but these were all for the benefit of respondents; ere were no irregularities, and no prospective bidders were sled. As to the absence of bidders, this court said in Laughlin v M.B. & L. Assn., 57 Nev. 181,60,P.2d 272: "We are t aware of any authority holding that a sale of this kind is id, for the single reason that no persons were present except e trustee and the beneficiary's attorney or agent." (3) the

ale of the property as a whole and not by parcels - but there as no abuse here of the exercise of the trustee's discretion, nd no one requested a sale by parcels; (4) the release of the ive-acre parcel - but the five acres released were to the ttorney for the respondents; (5) the acceptance of the check f the high bidder - but this was almost immediately converted nto a cashier's check; (6) the attack on the conduct of the rustee in alerting the Goldens to attend the sale and bid, and ater in the suggestion that the Goldens' raise in the bid by one ollar instead of by a few cents - but nothing in this suggests raud, conspiracy, collusion or other fault. To these observa- ions there should be added the long-existing default; the fact nat the trustee gave information and knowledge to the trustors n addition to that required by statute, and particularly putting nem on notice that foreclosure was imminent; the many continuan- es of the sale to give the trustors an opportunity to refinance; ne actual assistance given them by the trustee; the entire bsence of anything tending to support the accusation that other idders were discouraged. To this must be added the consideration f the practical fact that the beneficiary was only bidding in the quity of the trustors. When bidding for the property subject to

he provisions of the first deed of trust, the beneficiary was to ll intents and purposes assuming the obligation to meet the onthly payments of $705 under the first deed of trust, or, in efault of this, in the realization that the first deed of trust ould be foreclosed and wipe out the equity purchased by the eneficiary here involved.

In virtually all foreclosures the trustor or mortgagor uffers a loss.[2] He has not been able to meet his obligation nd loses the property. When the sale is by a trustee, as in he present case, he loses it without an equity of redemption. f the sale is properly, lawfully and fairly carried out, he annot unilaterally create a right of redemption in himself. If he sale is made under a mortgage subject to redemption, he annot unilaterally extend the period of redemption beyond his tatutory right. These are all situations which a borrower must ecognize in executing a mortgage or deed of trust. We regret, as o all courts facing such a situation, that the mortgagor or trus-or must lose his property, but we cannot arbitrarily afford re-ief under such circumstances as here exist.

"1. From time immemorial such 'irreparable injury' has been the ot of mortgagors and trustors who have been unable to meet their bligations." Bankers Trust Co. v. Bordwell, 79 Nev. ...386 P2d 32.

Reversed and remanded with instructions to enter judgment denying relief to the respondents.

McNamee and Thompson, JJ., concur.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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	)	
Appellants,	)	
	)	
v.	)	
	)	No. 20175
RICHARD GOLDEN and AUDREY Y. GOLDEN,	)	
	)	
Appellees.	)	
	)	

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FILED
AUG 2 _ 1965
FRANK H. SCHMID, CLERK

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A. JURISDICTIONAL STATEMENT

In this action the appellants (hereafter called the plaintiffs) seek a determination under the Due Process Clause of the Fourteenth Amendment to the United States Constitution that a foreclosure sale under a deed of trust, and a trustee's deed to the appellees (hereafter called the defendants) pursuant to the foreclosure sale, are null and void because the plaintiffs did not have any notice whatever that the indebtedness secured by the indebtedness was in default, or of any of the proceedings for sale. (Tr. 1-4).

The statutory basis of jurisdiction is Title 28 U.S.C. Sec. 1332, as to diversity of citizenship. Additional statutory jurisdiction arises under Title 28 U.S.C., Sec. 1331, because the matter in controversy arises under the Constitution of the United States. (Tr. 1-4).

The lower court made "Findings of Fact" numbered 1, 2 and 3, that the plaintiff Kiyo Tomiyasu is a citizen and resident of the State of New York, the plaintiff Uwamie Tomiyasu is a citizen and resident of the State of California, the defendants are citizens and residents of the State of Nevada, and the amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. (Tr. 145-146).

The validity of the following statute in Nevada is involved:

"1. Where any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation, for which such transfer is security.

2. The power of sale shall not be exercised, however, until:

(a) In the case of any trust agreement coming into force on or after July 1, 1949, and before July 1, 1957, the grantor has for a period of 15 days failed to make good his deficiency in performance or payment, and, in the case of any trust agreement coming into force on or after July 1, 1957, the grantor has for a period of 35 days failed to make good his deficiency in performance or payment; and

(b) The beneficiary shall first record in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of such notice.

3. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, prior to the making thereof, give notice of the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

4. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption."

The lower court gave a summary judgment in favor of the defendants on the ground of res judicata (Tr. 149-150) from which the plaintiffs appealed to this Honorable Court (Tr.151) and it is now vested with jurisdiction over this appeal under Rule 73, Federal Rules of Civil Procedure.

B. STATEMENT OF THE CASE

The property which is involved in this case consists of an 80-acre tract of land in Clark County, Nevada, which had belonged to the Tomiyasu family for about 46 years at the time the foreclosure sale was conducted in 1962. (Tr. 31). During this period of time the land had been developed from a barren desert to a fertile farm where the father, Bill Yonema Tomiyasu lived and where he raised a large number and variety of nursery plants. (Tr. 31). At the time of the foreclosure sale, Bill Yonema Tomiyasu was 80 years of age, helpless and undable to work. (Tr. 31).

There was an encumbrance of record against the land consisting of a first deed of trust in favor of First Western Savings & Loan Company of Nevada in the sum of $38,968.29. (Tr. 60) on which the monthly payments amounted to $709.00 (Tr. 60). The Tomiyasus had entered into twelve land sale contracts upon which a balance was due in the sum of $59,759.38, exclusive of interest, at the time of the foreclosure proceedings. (Tr. 25). Excluding the value of these land sale contracts, the market value of the land in 1962 was approximately $200,000.00. (Tr. 60).

In 1959, Bill Yonema Tomiyasu, and his daughter Uwamie Tomiyasu, and his son Kiyo Tomiyasu, each owned an undivided one-third interest in the land. (Tr. 1, 23). In that year a

second deed of trust was executed covering the land for an indebtedness which amounted to $18,024.73, at the time of the foreclosure sale. (Tr. 2). This deed of trust was executed for the sole benefit of Bill Yonema Tomiyasu, who was responsible for making the payments due on the obligation the deed of trust secured (Tr. 142). Bill Yonema executed the deed of trust on behalf of his son and daughter who are the plaintiffs here under a power of attorney (Tr. 142), and the plaintiffs did not personally participate in the negotiations leading up to this deed of trust or its execution. (Tr. 142).

Unknown to the plaintiffs, who were citizens and residents of California and New York, the father, Bill Yonema Tomiyasu, became delinquent in making the payments on both the first and the second deed of trust. (Tr. 61, 142). On October 26, 1961, the beneficiary under the second deed of trust by letter notified the trustee of the default and asked the trustee to prepare a notice of default and election to sell under the deed of trust. A copy of the bank's letter to the trustee was mailed to Bill Yonema Tomiyasu (Tr. 4). From September to November, 1961, Bill Yonema Tomiyasu was absent in Japan.(Tr. 61). The trustee recorded a notice of default and election to sell in the official records of Clark County, Nevada, at the office of the County Recorder on November 13, 1961. (Tr. 9). In February, 1962, a notice of

trustee's sale was published in a Las Vegas newspaper, and notice that the publication was running was mailed to Bill Yonema Tomiyasu, the sale being set for March 13, 1962. (Tr. 61).

About the month of September, 1962, Nanyu Tomiyasu, another son of Bill Yonema Tomiyasu, knew that his father was in financial difficulty and believed him to be of such advanced years that he could not fully understand and comprehend the financial situation that he was in or that he was in danger of losing his property. Nanyu Tomiyasu contacted the United Mortgage Company in Las Vegas, Nevada, in an effort to obtain a loan on the property sufficiently large enough to satisfy existing obligations of his father and the encumbrances against the property. He dealt with United Mortgage Company for a number of weeks. (Tr. 101).

On information from United Mortgage Company as to its progress with getting the property refinanced, the trustee postponed the foreclosure sale from the original date of March 13, 1962, (Tr. 101). During these negotiations, a representative of United Mortgage Company notified Bill Yonema Tomiyasu and the trustee that it had obtained a loan commitment and the loan would go through.(Tr. 102). Pursuant to the postponements of the sale which had been had, the sale was eventually scheduled to take place on April 23, 1962.

On April 21, 1962, two days before the date of the sale,

United Mortgage Company notified Nanyu Tomiyasu that the loan commitment had been withdrawn. (Tr. 103).

The advertised sale was postponed on seven separate occasions. Each postponement was proclaimed from the front door of the trustee's office. On none of these occasions did any bidders appear. (Tr. 62).

On April 22, 1962, the trustee went to the home of Nanyu Tomiyasu, advising the sale was to be the next morning. That afternoon, Nanyu Tomiyasu contacted his then attorney, Lester H. Berkson, and told him of the foreclosure sale scheduled for April 23, 1962. In the early morning hours of April 23rd, the two of them went to the office of the trustee where Lester Berkson requested a postponement of the sale until the next day, April 24, 1962, and the sale was postponed, at which time Lester Berkson assured Nanyu Tomiyasu that a loan from other sources could be secured by him by the next day. Then, on April 24, 1962, Lester Berkson went to the offices of the trustee and stated in the presence of Nanyu Tomiyasu, that he wanted the sale postponed for another day, that he had a loan commitment from other parties and if the loan were not consummated, he, the said Berkson, would pay the obligation himself. (Tr. 103, 104).

On April 24, 1962, an employee of the trustee contacted the defendant Richard Golden and notified that the sale would

be conducted the next day at the hour of 10:00 A.M. (Tr.105).

The defendants arrived at the trustee's office on April 25, 1962, about an hour before the sale was scheduled and waited for it. The attorney, Lester Berkson, did not appear and numerous efforts made by Nanyu Tomiyasu (the only member of the Tomiyasu family who was present at the sale) to locate him were unsuccessful. (Tr. 105).

The trustee called the sale and announced that five acres of the property had been released from the trust deed to the attorney, Lester Berkson. (Tr. 62). He then announced that he had a bid of $18,024.73 (the cash bid of the bank which was the beneficiary under the trust deed, for the amount owed to it). At this point, the defendant Audrey Y. Golden offered to bid a few cents more. The trustee invited her to increase her bid to $1.00 more, and then accepted the bid of $13,025.73, accepted the personal check of the defendants for that amount and kept the check for one day before presenting it to the bank for payment in order to give the defendant Richard Golden an opportunity to deposit sufficient funds to cover this check. (Tr. 48).

On June 14, 1962, 49 days after the sale, the complaint in the first Tomiyasu case was filed (Case No. 117703, Eighth Judicial District of the State of Nevada, in and for Clark County), and with its filing, the Tomiyasus tendered

into court the full amount of the purchase price paid by the defendants and offered to pay to them any accrued costs. (Tr. 59).

The judge who presided at the trial of the first Tomiyasu case filed a decision which characterizes Nanyu Tomiyasu's participation in these proceedings as follows:

> ". . . there is much left to the imagination in the role of Nanyu Tomiyasu. He was not a party to the transaction. It seems that the trustee knew all along that Mr. Berkson was the attorney for the mortgagors. On many occasions nothing was done without the aid or consent of Mr. Berkson. Nanyu Tomiyasu had no written authority to represent anybody and while his presence may have been given consideration, although Mr. Adams (trust officer) and Mr. Lingle (representative of the bank beneficiary under the deed of trust) may have felt they had a right to assume that they could recognize Nanyu Tomiyasu as an agent of the mortgagors, nevertheless it is not true in fact." (Tr. 49-51).

The complaint in the first Tomiyasu case set forth numerous allegations of irregularities surrounding the foreclosure proceedings. It was alleged therein that the notice of breach and election to sell under deed of trust

was not given to Kiyo and Uwamie Tomiyasu. (Tr. 26). In the papers supporting the defendants' motion for summary judgment with respect to these proceedings there appears only the following: Complaint (Tr. 21-42); Answer (Tr. 43-45); Decision of the lower court (Tr. 46-51); Judgment of the lower court (Tr. 52-56); Notice of Appeal (Tr. 57); Opinion by the Supreme Court of Nevada on appeal (Tr. 58-76), reported in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, Entry of Final Judgment on the Judgment Docket in the lower court (Tr. 77-78); Remittitur (Tr. 78); Order denying Petition for Rehearing (Tr. 79).

In the Decision of the lower court, it is affirmatively stated that six points were raised by the plaintiffs: (1) Gross inadequacy of price received by the trustee; (2) Failure of the trustee to sell to the highest cash bidder; (3) Improper sale of the property en masse instead of in parcels; (4) The release of five acres from the deed of trust after publication of the notice of sale; (5) Failure of the notice of sale to describe the improvements on the property, water well, buildings, plants, trees and shrubbery; and (6) Irregularities in the postponements of sale. (Tr. 46, 47). No mention is made in the decision of the lower court with respect to charge of absence of notice to Kiyo and Uwamie Tomiyasu.

The judgment for the plaintiffs in the lower court was reversed on the appeal. The only aspects of that decision pertaining to notice are the following:

> "(6) From September to November, 1961, Bill Yonema (the father) was absent in Japan and handed the management of the property over to his son Nanyu, who continued such management but kept his father fully advised. Bill Yonema knew of the delinquency, the immienence of the foreclosure, the receipt of the notices from the trustee, and they made various attempts to re-finance the loan through other sources." (Tr. 61),

and:

> "We are compelled to dispose of the various grounds on which respondents attempt to support the judgment as follows:
>
> "(1) As to the asserted deficiency in the trustee's notice of sale--this was given in strict compliance with the terms of the deed of trust and the statute." (Tr. 65).

In this case Kiyo and Uwamie Tomiyasu have challenged the validity of the foreclosure sale and deed of trust on constitutional grounds, for failure in the giving of any notice of them of the default and other proceedings.

The allegations of the present complaint relative to notice are as follows:

"V. * * * that on the 19th day of November, 1961, the First National Bank of Nevada, Reno, Nevada, did cause to be filed and recorded a notice of breach and election to sell under deed of trust, a copy of said notice being attached hereto and adopted by reference as 'Exhibit B'; that thereafter notice of trustee's sale was published on February 17, 1962 and on February 24, 1962, and on March 3, 1962 in the Las Vegas Sun newspaper.

"That said notice of breach and election to sell under said deed of trust was not served upon, or delivered, to the plaintiffs, nor was any notice of any kind or description given the plaintiffs of the notice of breach and election to sell under the deed of trust; neither did the First National Bank of Nevada at any time notify the plaintiffs, or either of them, of the default in payments due under the terms and conditions of said Promissory Note, nor in any wise advise the plaintiffs that the payments were not being kept up or made current.

"VI. That neither of the plaintiffs were at that time, or now, residents of the County of Clark, State

of Nevada, and neither of the said plaintiffs herein saw, read or had notice of the publication of the said notice of foreclosure in the Las Vegas Sun newspaper.

* * *

"XI. That the sale of said lands under the conditions as hereinabove set forth constituted, without notice, violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States." (Tr. 2, 3, 4).

The Answer filed by the defendants set forth as a separate Second Defense the pleading that "all matters now attempted to be litigated in this action have been or could have been litigated and concluded in Case No. 117703 in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, wherein Bill Yonema Tomiyasu, Kiyo Tomiyasu, Uwamie Tomiyasu and Nanyu Tomiyasu were Plaintiffs, and Richard Golden and Audrey Y. Golden were Defendants, which action was heretofore concluded by final judgment entered on February 7, 1964, by the Clerk of the above entitled Court and that the said prior judgment now constitutes res judicata to the action filed herein." (Tr. 14, 15).

The defendants moved for summary judgment under Rule 56,

Federal Rules of Civil Procedure, in their favor on the ground set forth in the aforesaid Second Defense. (Tr. 18, 19).

The plaintiffs filed a response to the motion for summary judgment (Tr. 134-136) setting forth the following:

1. That the proceedings in the case relied on as res judicata of the present issues, the opinion of the Supreme Court of the State of Nevada on an appeal in that case (Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989) and the judgment in conformity with that opinion, are based upon an arbitrary and grossly and obviously erroneous holding that due notice was given of the sale under the trust deed.

2. That the plaintiffs did not have any notice of default under the deed of trust, or of the Notice of Breach and Election to Sell under Deed of Trust, or the Notice of Sale or its publication or posting.

3. That the plaintiffs were not actual parties litigant to said former litigation.

4. That under the circumstances set forth in the present complaint and the affidavits supporting the response, it would be unjust, inequitable and unconscionable and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States to allow the defendants to retain the lands which are the subject matter of this litigation.

5. That genuine questions of material fact are raised by the response to the motion for summary judgment and supporting affidavits and by the complaint on file herein.

Two affidavits were filed in support of the said Response. The first is an affidavit of the undersigned counsel for the plaintiffs (Tr. 137-140) setting forth that the undisputed testimony in the former case shows the complete absence of the giving of any notice whatever to the plaintiffs of any default in payments due under the obligation secured by the second deed of trust, or of the notice of breach and election to sell, or of the sale itself; that the undisputed testimony in that case also shows that the purported notice of sale was not posted in accordance with the statutory requirements of the State of Nevada; that the decision of the Supreme Court of Nevada in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, and the judgment pursuant thereto, are based upon a holding to the effect that the trustee gave the notice required by the statute, which holding was made arbitrarily and is grossly and obviously erroneous and contrary to the undisputed testimony in the case, and such palpably erroneous determination was not the product of any laches, neglect or any omission whatever on the part of the plaintiffs; that the undisputed testimony in the former case establishes that no attempt whatever was made by the trustee or the beneficiary under the trust deed to give

actual or personal notice to the plaintiffs of any default, notice of breach and election to sell, or the sale itself, although at all times material thereto, the plaintiffs were widely acquainted in Clark County, Nevada, and the City of Las Vegas, and their whereabouts could have been readily ascertained.

The second affidavit is that of the plaintiff Uwamie Tomiyasu (Tr. 141-143) which verifies the allegations of the complaint and further states that the deed of trust which was foreclosed was executed on her behalf by Bill Yonema Tomiyasu as her Attorney in Fact, that she did not personally participate in the negotiations for the execution of the said deed of trust, or the execution thereof, which was executed for the sole benefit of Bill Yonema Tomiyasu, who was responsible for the making of any and all payments due thereunder; that she did not receive any notice whatever of any default under the deed of trust, of the recording of the Notice of Breach and Election to Sell, or of the posting of the publication of the Notice of Sale under the deed of trust, and she did not know that the payments were not being kept up under the deed of trust. She further states that she did not participate in any way in any proceedings or activities whatever regarding the trustee's sale and was unaware of the existence of such proceedings and activities, and she was neither a resident of

nor present in the State of Nevada, but was at such times a resident of and present in the State of California. She further states that she was not an actual party litigant in the former case; that at the time of the filing of the complaint in that case and at all times thereafter she was not informed about or consulted with as to the institution or the prosecution of that case and did not participate in any of the proceedings in that case either in person or by an attorney; that she was not advised of the date of the trial held therein, she did not appear at said trial, either in person or by an attorney, and she did not participate in any way throughout the entire course of the proceedings in said case, including the appeal had to the Supreme Court of the State of Nevada. She stated on information and belief that her name was nominally included as a plaintiff in the former case without notification to her thereof and without her knowledge and consent because of her ownership of an undivided one-third interest in the property, in order that the complaint of the actual party in interest in that case, Bill Yonema Tomiyasu, would not be subject to dismissal upon the ground of absence of necessary or indispensable parties plaintiff.

The lower court made a "finding of fact" that the plaintiffs in this action were plaintiffs in the earlier case No. 117703 in the Eighth Judicial District Court of the State

of Nevada, in and for the County of Clark, and that the subject matter in Case No. 117703 is the same subject matter in this action, namely: That certain real property situate in Clark County, Nevada, more particularly described in the trustee's deed dated April 27, 1962, and recorded in the office of the County Recorder of Clark County, Nevada, as document No. 288385, wherein the real property was conveyed from the trustee to the defendants. (Finding of Fact inadvertently misnumbered No. 4 appearing at Tr. 147.)

The lower court made Conclusions of Law that the issues raised by the pleadings in the above entitled action are the same issues which were litigated to a final judgment in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. (Tr. 147, 148).

C. SPECIFICATION OF ERRORS.

I.

The lower court erred in granting summary judgment because a genuine issue of material fact existed as to whether or not the plaintiffs were actual participants in the first Thomiyasu case, so as to be bound by the doctrine of res judicata.

II.

The lower court erred in granting summary judgment because a genuine issue of material fact existed as to whether or not the first Tomiyasu case was decided on its merits as to the plaintiffs, so as to have the effect of res judicata.

III.

The lower court erred in granting summary judgment because the defendants did not sustain their burden of establishing that the cause of action in the first Tomiyasu case is identical with the cause of action sued on in this case.

IV.

The lower court erred in granting full faith and credit and res judicata effect to the judgment in the first Tomiyasu case because that judgment rests on a holding that the notice given by the trustee as to the default under the deed of trust, the notice of breach and election to sell under the deed of trust, and the notice of sale were given in compliance with the deed of trust and the statutes of Nevada, which holding is contrary to the uncontradicted testimony in the case and is grossly and obviously erroneous.

V.

The lower court erred in granting summary judgment

because the defendants are not entitled thereto as a matter of law, because the important constitutional issues raised in this case require determination in the light of full development of all facts, at a regular trial.

VI.

The lower court erred in making "Findings of Fact" on a genuinely disputed issue of material fact, as to whether or not the plaintiffs were actual participants in the first Tomiyasu case.

VII.

The lower court erred in failing to express some decision with respect to the contentions of the plaintiffs as to the factual and legal issues in the case.

VIII.

The lower court erred in granting summary judgment against the plaintiffs when the proofs relied on by the defendants were not sufficient to establish that there were no genuinely disputed issues of material fact and that they were entitled to summary judgment as a matter of law.

D. ARGUMENT OF THE CASE

SUMMARY

The plaintiffs have invoked the jurisdiction of the federal court under Title 28 U.S.C., Secs. 1331 and 1332

raising the constitutional issue that a foreclosure sale under a deed of trust was conducted without notice to them in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The defendants moved for and were granted a summary judgment on the basis of res judicata.

On this appeal the plaintiffs challenge the lawfulness of that summary judgment on both substantive and procedureal bases.

The plaintiffs brought an action in the State of Nevada against the present defendants and the persons who participated in the negotiations and transactions leading up to the sale of the encumbered lands. This litigation is adverted to in the papers supporting the defendants' motion for summary judgment at pages 96 - 131 of the transcript of record. A summary judgment in that case was affirmed on appeal by a majority of the court. The Honorable John E. Gabrielli, District Judge, designated to sit in the place of Judge McNamee, dissented, and his expression as to the meritoriousness of the plaintiffs' contentions is applicable to the present case:

> "The conscience of this writer is shocked that in this age, an 82 year old Japanese resident of this State since 1916, and his family can be treated with such injustice and be deprived of their real property

unquestionably valued in excess of $200,000.00 (excluding the value of the land sales contracts, upon which there is a balance due Plaintiffs in the sum of $59,749.38 not including interest, which payments have been demanded by Defendants) by foreclosure of Second Trust Deed for the sum of $18,025.73 subject to a First Trust Deed of $38,968.29 which according to the present complaint was accomplished by means of an alleged conspiracy to defraud and deprive Plaintiffs of the aforesaid property by Defendants -- some of whom were in a fiduciary relationship with Plaintiffs and others were supposed to be protecting their interests throughout said proceedings. Full tender of the amount due plus costs was made to the purchasers within a reasonable time after the foreclosure sale which was rejected. This case crys out for relief, a meaningful day in Court and justice according to well established rules of law. This Court in Moore v. Prindle (July, 1964) 80 Nev. 369, 394 P.2d 352, a case involving forefeiture under a contract of sale, reversed the lower Court's declaration of forfeiture and in doing so stated, 'Moore tendered the amount necessary to cure the default within a reasonable time. As was said in the case

of Mosso v. Lee, 53 Nev. 176, 295 P. 776,

' * * * there can be no doubt in this age, even where time is of the essence of a contract to convey real estate, coupled with a provision of forfeiture, but that a court of equity will grant relief from a default and a declaration of forfeiture if the condition be subsequently performed, or tendered, without unreasonable delay, where no circumstances have intervened that would render it unjust or inequitable to give such relief.' This language is fully applicable in all respects to the instant case."

An application for review on writ of certiorari of the decision in that case is presently pending before the Supreme Court of the United States.

The controversy which is the subject of this action also "crys out for relief, a meaningful day in Court and justice according to well established rules of law." (Tomiyasu v. Golden, Nev. 1965, 400 P.2d, 415, 419).

POINT ONE: DUE PROCESS OF LAW REQUIRES NOTICE BEFORE PROPERTY INTERESTS CAN BE DISTURBED OR FORFEITURE EXACTED.

The plaintiffs had no notice of the default or any of the further proceedings by which their interest in the property which is the subject of this litigation was foreclosed. (This fact is set forth in the verified complaint and the affidavits filed in resistance to the defendants' motion for summary judgment, and must be accepted as true in passing upon whether or not the defendants are entitled to a summary judgment under Rule 56, Federal Rules of Civil Procedure.)

The matters relied on by the defendants to support their motion for summary judgment do not establish that the constitutional claim of the plaintiffs was litigated in the first Tomiyasu case, but show, on the contrary, that the same was not litigated therein.

The following cases are the law of the land respecting the constitutional requirement that no person shall be stripped of his property without notice:

Schroeder v. New York, 1962, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 89 A.L.R.2d 1398; Lambert v. People of the State of California, 1957, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228; Walker v. City of Hutchison, 1956, 352 U.S. 112, 77 S.Ct. 200, 12 L.Ed.2d 178; Covey v. Town of Somers, 1956, 351 U.S. 141

76 S.Ct. 724, 100 L.Ed. 1021; Mullane v. Central Hanover Bank & Trust Co., 1950, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Griffin v. Griffin, 1946, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635.

In Schroeder, it was held that newspaper publications and posted notices, as provided for under the New York City Water Supply Act were not sufficient notice under the requirements of the Due Process Clause to support condemnation proceedings affecting property on the Neversink River in Orange County, New York, which the owner and her family occupied only during the months of July and August each year. That case reviews the constitutional principal and cases decided under it:

> "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v Meyer, 311 U.S. 457; Grannis v.Ordean, 234 U.S. 385; Priest v. Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398.' Mullane v Central Hanover Bank & Trust Co. 339 US 306, 314, 94 L ed 865, 873, 70 S Ct 652."
>
> * * * * * * * * *
>
> "As was emphasized in Mullane, the requirement

that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process--the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' 339 US at 314, 94 L ed at 873, 70 S Ct 652. The Court recognized the practical impossibility of giving personal notice in some cases, such as those involving missing or unknown persons. But the inadequacies of 'notice' by publication were described in words that bear repeating here:

'Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.' 339 US, at 315, 94 L ed at 874, 70 S Ct 652.

"The general rule that emerges from the Mullane Case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. 'Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.' 339 US, at 318, 94 L ed at 875, 70 S Ct 652.

"This rule was applied in New York v New York, N.H. & H.R. Co. 344 US 293, 296, 97 L ed 333, 336, 73 S Ct 299, where the Court pointed out that '(n)otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '(i)ts justification is difficult at best.' The rule was applied again in Walker v Hutchinson City, 352 US 112, 1 L ed 2d 178, 77 S Ct 200, in a factual situation much akin to that in the present case. In Walker part of the appellant's land had been taken in condemnation proceedings, and he had been given 'notice' of a proceeding to fix his compensation only by publication in the official city newspaper. The Court held that such notice was constitutionally

insufficient, noting that the appellant's name 'was known to the city and was on the official records,' and that '(e)ven a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.' 352 US, at 116, 1 L ed 2d at p 182, 77 S Ct 200."

In Lambert, it was set forth: "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed."

In Walker, the rule was applied: ". . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."

In Mullane, the Court said: ". . . When notice is a person's due, process which is a mere gesture is not process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In Griffin, the Court held a judgment obtained without procedureal due process is not entitled to full faith and credit when sued on in another jurisdiction.

The plaintiffs are before this court attacking the proceedings by which the defendants obtained the trust deed because of a total absence of notice to them that their pro-

perty interests were called up to be forfeited. Of course, these were not judicial proceedings, but they were done pursuant to the authority to sell conferred by statute, and the requirements of due process apply to such proceedings with the same force and effect as to a state acting through a judicial tribunal.

Under the law of the land, the acts of the beneficiary under the trust deed and the trustee, and Nevada Revised Statutes, Sec. 107.080, did not constitute and do not provide for the effective notice which is required under the Due Process Clause.

POINT TWO: THE VALIDITY OF A DEFENSE OF RES JUDICATA MUST BE DETERMINED BY FEDERAL LAW AND UNDER FEDERAL LAW, DISPOSAL OF IMPORTANT CONSTITUTIONAL ISSUES BY WAY OF SUMMARY JUDGMENT IS NOT APPROVED.

The constitutional claim made by the plaintiffs was not in issue and was not decided in the first Tomiyasu case. The plaintiffs were not required to make that claim in the state court. They are authorized to make it here, and whether or not the defense of res judicata is valid must be determined under federal-judicially declared law.

These principles are set forth in the case of Howard v. Ladner, D.C. Miss., 1953, 116 F.Supp. 783.

In that case the plaintiffs brought a federal action to enjoin state officials from enforcing a state statute regarding registration of the name of a political party on the ground the statute, as construed, constituted a denial of due process. The controversy had been before the courts of Mississippi, and an adverse decision was offered as res judicata on a motion for summary judgment. The plaintiffs had sought review of the Mississippi decision on writ of certiorari in the United States Supreme Court, but their petition was denied because it was not timely filed.

It was urged that the plaintiffs had a right to direct appeal to the United States Supreme Court from the Mississippi decision and that they were thereby precluded from raising the federal constitutional question. Of this the court said:

> "The United States Courts are the peculiar guardians of the Constitution of the United States. The decisions of even the highest state courts are not binding upon federal courts concerning questions arising under the Constitution of the United States. If we were concerned simply with an application of the doctrine of stare decisis, it would be clear that we are not bound by the opinion of the Supreme Court of Mississippi. When

all that is involved is the decision of a pure question of law, it seems doubtful whether a different result should follow because we call the doctrine res judicata rather than stare decisis."

In considering whether the causes of action were the same in the two cases, the court said:

"What the Mississippi Circuit Judge said as to the constitutionality of the statute was in connection with its construction. The primary objective of the action in the state court was to secure a proper construction of the statute, the plaintiffs contending that the statute must be construed to afford them relief in order to sustain its constitutionality. The judgment of the Supreme Court of Mississippi does not mention the constitutionality of the statute. Its opinion in that respect may be referred to the statute's construction by way of showing that the Circuit Judge was in error in holding that he must construe the statute as he did in order to sustain its constitutionality. The claim adjudged was the right to relief under the Mississippi statute, the exclusive right to the use of the name 'Republican'. The claim now sought to be enforced is the right to relief against or despite the Mississippi statute, the right to the use by the plaintiffs, not

exclusive of the defendants, of the name 'Republican'. The plaintiffs argue that they are not foreclosed from struggling for co-existence, because they have been beaten in a war of extermination.

(12, 13) From the viewpoint of trial convenience, we may observe that an authoritative construction of the statute by the State Supreme Court was necessary before this Court could proceed with a suit to enjoin its enforcement and execution as violative of the Constitution of the United States. 28 U.S.C.A. Sec. 2284(5). Shipman v. DuPre, 339 U.S. 321, 70 S.Ct. 640, 94 L.Ed.877. The federal courts will not assume, in advance of decision by the state court of last resort, that that court will place such a construction upon a statute as will render it obnoxious to the federal Constitution. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 186, 52 S.Ct. 548, 76 L.Ed. 1038; Arizona Copper Co. v. Hammer, 250 U.S. 400, 430, 39 S.Ct. 553, 63 L.Ed. 1058; Pelton v. Commercial National Bank, 101 U.S. 143, 25 L.Ed. 901. It is natural, therefore, and even necessary for plaintiffs to proceed first in the state courts to secure a construction of the statute."

In considering the defense of res judicata, the court pointed out that since the case raised an issue under the

onstitution of the United States that the validity of the efense of res judicata was to be determined according to ederal-judicially declared law. It noted an article in 5 Harvard Law Review, pp. 818, 824, entitled, "Developments n the Law of Res Judicate," which examined the policy con- iderations applied by the courts in passing on the defense, rial convenience, stability, countervailing policies, and ffect of waiver, fraud and mistake on merger. In speaking f countervailing policies, the court stated:

"(17) (f) Countervailing Policies. We have discussed a number of the factors entering into the application of the doctrine of res judicata which give cause to its application in the present case. We prefer, however, to base our decision upon considerations of public policy to which the doctrine of res judicata should yield. As was stated by Judge Hutcheson in Holmes v. Donald, 5 Cir., 84 F.2d 188, 190, 'It (res judicata) is not a Procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently, determined.' Mr. Justice Rutledge in his dissenting opinion in Angel v. Bullington, supra, 330 U.S. at page 203, 67 S.Ct. at page 668, made, it seems to us,

a sound observation, not in conflict with the opinion of the Court in that case, to the effect that it is not every case 'in which the policy of stopping litigation outweighs that of showing the truth.' In Mercoid Corporation v. Mid-Continent Co., supra, 320 U.S. at page 670, 64 S.Ct. at page 273, Mr. Justice Douglas, speaking for the Court, said:

'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. 'Where an important public interest would be prejudiced,' the reasons for denying injunctive relief 'may be compelling.' City of Harrisonville v. W. S. Dickey Clay Co., 289 U.S. 334, 338, 53 S.Ct. 602, 603, 77 L.Ed. 1208. And see United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 801, 83 L.Ed. 1211. * * * That principle is controlling here. The parties cannot foreclose the courts from the exercise of that discretion by the failure to interpose the same defense in an earlier litigation. Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 63 S.Ct. 172 (87 L.Ed. 165)."

The summary judgment was denied in this language:

". . . A right decision as to the constitutionality of the statute, subject to effective review by the Supreme Court of the United States, is of so much public importance that, in our opinion, it supersedes the rule of res judicata. The motions of the defendants for summary judgment are therefore denied."

It has often been recognized that a court of equity can grant relief in an independent action brought to set aside a judgment for fraud, mistake or lack of jurisdiction. See, for example, Sayers v. Burkhardt, CA 4th, 85 F. 246, cert. den., 172 U.S. 649, 19 S.Ct. 886, 43 L.Ed. 1183. Similarly, equity exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud or mistake. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; Dolcater v. Manufacturers & Traders Trust Co., D.C., N.Y., 1938, 25 F. Supp. 637.

There is also a doctrine that when a judgment is arbitrary and grossly and obviously erroneous, such error may constitute a denial of due process of law, and such judgment be no more effective to conclude the rights of a party than one procured by fraud. The doctrine was announced, although not applicable to the particular judgment in question there, in the

case of Roberts v. City of New York, 1935, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689:

"Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63, 70, 55 S.Ct. 316, 79 L.Ed. 761. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 246, 17 S.Ct. 581, 41 L.Ed. 979; Backus v. Fort Street Union Depot Co., 169 U.S. 557, 565, 18 S.Ct. 445, 42 L.Ed. 853; Appleby v. Buffalo, 221 U.S. 524, 532, 31 S.Ct. 699, 55 L.Ed. 838. At other times we are told that due process is not lacking unless 'plain rights' have been ignored, with a reminder that much will be overlooked

when there is nothing of unfairness or partiality in the course of the proceedings. McGovern v. City of New York, supra, 229 U.S. 363, at page 373, 33 S.Ct. 876, 57 L.Ed. 1228, 46 L.R.A. (N.S.) 391. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences or degree too subtle to be catalogued. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828, 14 Ann. Cas. 560; Klein v. Board of Supervisors, 282 U.S. 19, 23, 51 S.Ct. 15, 75 L.Ed. 140, 73 A.L.R. 679. Cf. Davidson v. New Orleans, 96 U.S. 97, 104, 24 L.Ed. 616. One cannot hope to mark its bearings in a sentence or a paragraph."

It is respectfully submitted that if the decision of the trial court in the first Tomiyasu case (Tr. 46-51) is lined up beside the opinion of the Supreme Court of Nevada in that case (Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, Tr. 59-76) the quality and extent of the errors made is inescapably apparent. With specific reference to the question of notice, it is patently obvious that no notice was ever given by the beneficiary or the trustee to Kiyo and Uwamie Tomiyasu as to the default, the notice of breach and election to sell, and the

notice of sale, and that notices were not even posted in accordance with the requirements of the trust deed and Covenant No. 6 of Nevada Revised Statutes, Sec. 107.030, in that it is required that posting be made in three public places of the township where the property is situated and also where the property is sold. In this case the lands were located in Township 22 South, of Ranges 61 and 62 East, Clark County, of which no part of the property is located in the City of Las Vegas where the sale was held. The undisputed evidence in the case shows that two notices were posted in the City of Las Vegas (one at the Clark County Court House and one at the City Hall of the City of Las Vegas) and that one notice was posted in Township 22 on a tree near a shack on the lands involved in this case and that no other notices whatever were posted at any locations. (The foregoing matters are set forth in the Affidavit in Resistance to Defendants' Motion for Summary Judgment of the undersigned, Tr. 137-140). The decision of the Nevada Supreme Court is based upon a holding to the effect that the trustee gave the notice required by the statuted, which holding is arbitrary and wholly contrary to the undisputed testimony in the case, and that holding was not the product of any laches, neglect or omission whatever on the part of the plaintiffs. Such a decision is itself violative of the requirements of due process and is not entitled to full faith

and credit or to stand as res judicata.

At the time the case of Howard v. Ladner supra was decided, the decision in Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657 was in effect that where a federal district court is sitting in a civil case on diversity of citizenship, it sits simply as another court of the state, and for failure of the plaintiff to take an appeal to the Supreme Court of the United States on federal issues involved in the state court decision, he was foreclosed under the doctrine of res judicata from bringing a proceeding in federal district court.

The court in Howard v. Ladner held it was not limited by this restriction since that was not a diversity of citizenship case alone, but one which raised constitutional questions. That is also true of the present case, but the rule of Angel v. Bullington is in effect overruled under the recent decision of Donovan v. City of Dallas, 1964, 377 U.S. 408, 12 L.Ed.2d 409, 84 S.Ct. 1579, holding that the question whether a plea of res judicata would be good in a federal action brought by plaintiffs who had been unsuccessful in similar state court action was for federal courts.

As is brought out in the statement of the case, and will be argued hereafter, under later points, there are substantial questions of disputed fact in this case which preclude decision

by summary judgment, but even if that were not so, the nature of the case and the importance of the constitutional issues raised by it are such that disposition by summary judgment is erroneous. Kennedy v. Silas Mason Co., 1948, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347; Pacific American Fisheries v. Mullaney, CA 9th, 1951, 191 F.2d 137. These cases are illustrative of the rule that before a district court can enter a summary judgment it must determine both (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law, under Rule 56 (c), Federal Rules of Civil Procedure. A finding that there are no genuine issues of fact does not automatically establish that the moving party is entitled to a judgment as a matter of law. Shahid v. Gulf Power Company, CA 5th, 1961, 291 F.2d 422.

POINT THREE: TO BE RES JUDICATA, THE FORMER CASE MUST HAVE BEEN ON THE SAME CAUSE OF ACTION, BETWEEN THE SAME PARTIES, AND DECIDED ON THE MERITS.

Under the preceding point, it has been shown that in the first Tomiyasu case no constitutional issues were raised or determined. Under the rule of the authorities therein cited, the present case is not on the same cause of action as the

first one.

As has been shown under the Statement of the Case, there was a bare allegation that the plaintiffs did not have notice of the breach and election to sell was not made the basis of any constitutional claim in the case, and it was not the subject of comment or holding by the trial judge in his Decision or in the Opinion of the Supreme Court of Nevada.

The affidavit of Uwamie Tomiyasu (Tr. 141-143) states that she was not an actual party litigant in the first Tomiyasu case; that she was not informed about or consulted with as to the institution or prosecution of the case and did not participate in any of the proceedings therein, either in person or by an attorney, and that she did not participate in any way throughout the entire course of the proceedings including the appeal to the Nevada Supreme Court; that the inclusion of her name as a party plaintiff was without obtaining her consent, without notification to her and without her knowledge.

The defendants have contended before the lower court that the plaintiffs are estopped to deny that they were parties to the first Tomiyasu case. (See Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment, erroneously omitted from the original transcript and the original of which has been separately forwarded to the court).

The argument of the defendants was (1) that there is

inconsistence between the affidavits of Uwamie Tomiyasu (Tr. 137-140) and that of the undersigned (Tr. 141-144) in resistance to the motion for summary judgment; (2) that such contention was not raised in another case (No. A8739, Eighth Judicial District Court, State of Nevada) where the defendants also asserted the bar of res judicate; and (3) that by virtue of the power of attorney given to Bill Tomiyasu he had complete authority to institute a suit in her name to set aside the foreclosure sale.

Certainly any issue of estoppel is a question of fact, and defendants seem to so recognize, since it is only with respect to the power of attorney that they have urged estoppel "as a matter of law." But it is hornbook law that a power of attorney is not self-executing and intention to exercise the power will never be presumed. 41 Am. Jur. "Powers" Secs. 45, 46. These factual questions are in dispute and cannot be determined on a motion for summary judgment.

Such a question arose in the case of Perrera v. Smolowitz, D.C., N.Y., 1952, 12 F.R.D. 444, 17 F.R.Serv. 56c433, Case 1. There the court took notice of a situation in which the former litigation in a negligence action had been conducted by insurance attorneys, and in another action arising out of the same transaction the court refused to give a partial summary judgment saying the entire subject of the participation of the named

parties to the suit would have to be laid bare at a regular trial of the case. The court said:

"... it is an established principle that where an essential question of fact is actually litigated in one action and determined therein, that determination is conclusive between the parties in any subsequent action wherein the same factual issue arises.

"The difficulty of the present situation is that if the defendant Harry Smolowitz' affidavit is true, there was no actual litigation, and as to that the testimony of all parties, ostensible and actual, ought to be taken before it can become possible to know in any true sense whether the doctrine of collateral estoppel is involved.

"It is concluded that the interests of justice require that the defendants be given their day in court to demonstrate, if they can, that they should not be subjected to the rigors of res judicata unless and until it is clearly demonstrated that their rights to litigate in this case the question of negligence and their own counterclaim, have indeed been foreclosed."

To the same effect is Gonzales v. Tuttman, D.C., N.Y., 1945, 59 F.Supp. 858, where the plaintiff sought to recover on judgments rendered by the District Court of Puerto Rico.

The judgment purported to run against the individual defendants as well as the corporate defendant. The individual defendants obtained an ex parte order vacating the judgment to them on the ground they neither appeared nor were served. The plaintiff argued that the individual defendants waived service because of the appearance of their attorneys in the case and that since she had no notice of the ex parte order that it was null and void. The court said:

> ". . . It is well settled that the jurisdiction of any court exercising authority over a subject may be enquired into in every other court when the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceeding. Williamson et al. v. Berry, 49 U.S. 495, 8 How. 495, 12 L.Ed. 1170; Thompson v. Whitman, 85 U.S. 457, 18 Wall. 457, 21 L.Ed. 897; Kilbourn v. Thompson, 103 U.S. 168, 197, 198, 26 L.Ed. 377; Guarantee Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U.S. 137, 147, 11 S.Ct. 512, 35 L.Ed. 116; Simon v. Southern Railway Co., 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492; Adam v. Saenger, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649; Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85.
>
> "In the absence of essential facts concerning

jurisdiction over the persons against whom the said judgments purport to run, the motion for summary judgment as to the Second cause of action must accordingly be denied."

POINT FOUR: ON THE HEARING OF A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56c, FEDERAL RULES OF CIVIL PROCEDURE, THE COURT HAS NO AUTHORITY TO DETERMINE ISSUES OF FACT.

The lower court made no expression at all about the contentions raised by the plaintiffs in resistance to the motion for summary judgment. It did make "Findings of Fact" and "Conclusions of Law." (Tr. 145).

In the case of Trowler v. Phillips, CA 9th, 1958, 260 F.2d 924, this Honorable Court stated:

"It is interesting to note that findings of fact and conclusions of law were prepared and signed. The theory of a summary judgment is that there are no disputed facts. We have seen findings of fact accompanying summary judgments, Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which, while unnecessary, did provide a handy summary. But all too often a set of unnecessary findings of fact is the

tell-tale flag that points the way to a discovery that summary judgment should not have been granted."

In the case of Steiner v. Wertheimer, CA 6th, 1957, 250 F.2d 575, a summary judgment was reversed where the lower court did not make any explanatory opinion showing why in its opinion the numerous factual issues raised by the pleadings, involving two different legal theories in support of the relief sought, were not genuine issues. The Court said:

"The Court is of the opinion that the record in its present shape does not present the solid basis of findings based on litigation or uncontradicted facts or the views of the District Judge with respect to the legal issues involved, that should precede our review of the judgment rendered in this case. The factual situation should be fully developed through the usual trial procedure in the District Court, instead of summary judgment proceedings. Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257, 68 S.Ct. 1031, 92 L.Ed. 1347; Stevens v. Howard D. Johnson Co., 4 Cir., 181 F.2d 390, 394; Estepp v. Norfolk & Western Railway Co., 6 Cir., 192 F.2d 889; Hoy v. Progress Pattern Co., 6 Cir., 217 F.2d 701, 704."

Respectfully submitted,

s/ Harry E. Claiborne

HARRY E. CLAIBORNE
ATTORNEY FOR APPELLANTS

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S/ Harry E. Claiborne

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PROOF OF SERVICE

RECEIPT OF THREE COPIES of the foregoing Opening Brief of Appellants is hereby acknowledged this 20th day of August, 1965.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UWAMIE TOMIYASU and KIYO TOMIYASU, Appellants, vs. RICHARD GOLDEN and AUDREY Y. GOLDEN, Appellees.	Civil Appeal No. 20175

APPELLANTS' REPLY BRIEF

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FILED
NOV 19 1966
FRANK H. SCHMID, CLERK

UNITED STATES COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UWAMIE TOMIYASU and KIYO TOMIYASU, Appellants, vs. RICHARD GOLDEN and AUDREY Y. GOLDEN, Appellees.	)

APPELLANTS' REPLY BRIEF

Appellees' Answering Brief does not meet or answer any of the propositions raised under Points One through Four of Appellants' Opening Brief. The answering brief is directed to a question posed by appellees on page 6 of the brief inquiring whether "the final judgment of a court of concurrent jurisdiction preclude(s) appellants from relitigating the same issues and what is substantially the same cause of action?" The argument under this point is not addressed to any legal propositions as such, but is a rambling commentary in which appellees content themselves with relying on the opinion in the first State case (Golden v. Tomiyasu, 1963, 79 Nev. 503, 387 P.2d 989) and the policy of repose which underlies the doctrine of res judicata.

The answering brief ignores the constitutional issue raised under the Due Process Clause as set forth under Point One of appellants' opening brief.

validity of a defense of res judicata must be determined under federal law and that under the principles of federal law, the disposal of important constitutional issues by way of summary judgment is not approved, as set forth under Point Two of appellants' opening brief.

The answering brief ignores the point raised that the present cause of action, grounded on the United States Constitution and cognizable in the Federal Courts, is not the same cause of action as was sued on in the first State case. (See appellants' Point Three in the opening brief)

The answering brief ignores the point made by appellants in Point Four of the opening brief that the lower court has no authority in a proceeding for summary judgment to make findings of fact.

The tack of the appellees is to cling steadfastly to the "finding of fact" made by the Supreme Court of Nevada in the first State case, to the effect that the notice of the trustee's sale was given in strict compliance with the terms of the deed of trust and the statute. Appellees' refusal to go below the surface of this "finding of fact" is understandable--there is no evidence in the case to sustain it. Indeed, the record and the affidavits in this case affirmatively show that no notice was given to the appellants of the sale of their property and that the posted notice was insufficient under the law. Appellees refuse to see, with Mr. Justice Rutledge, that it is not every case "in which the policy of stopping litigation outweighs that of showing the truth." (Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832,

67 S.Ct. 657, 668, quoted in Howard v. Ladner, Miss., 1953, 116 F.Supp. 783, discussed at pages 33-35 of the Opening Brief.)

The answering brief urges on this Court that the constitutionality of Nevada's statutory provisions regarding notice of foreclosure sales under deeds of trust cannot be considered by this Court because the matter was not raised in the lower Court. Although the pleadings do not make a specific attack on these statutes, the allegations of the complaint are broad enough to challenge the constitutionality of the whole process culminating in the appellants being stripped of their property, including the Nevada statutes. But if appellants are in error in this contention, then it must be remembered that this case has never been tried. A judgment has been entered in proceeings under Rule 56 for summary judgment. If that judgment is reversed by this Court, the case will be tried in the lower court, where in advance of trial the pleadings can readily be amended to include the issue of the constitutionality of the Nevada statutes with all the specificity that appellees desire.

It is charged by appellees at page 9 of the answering brief that the argument of appellants that they were not parties litigant and did not participate in the first State case in person or by an attorney is "specious." That word is defined in The New Century Dictionary, Appleton Century Ed., as "fair-seeming, superficially pleasing, or apparently good or right, without real merit."

A charge that an argument, or an affidavit where the facts on which that argument is based are contained, is "specious," is an attack upon the credibility of the sworn statements. The credibility of sworn statements contained in affidavits filed in opposition to motions for summary judgment is not a matter which the court may determine in the proceedings authorized under Rule 56. U. S. v. General Ry. Signal Co. (W.D., N.Y., 1952) 110 F.Supp. 422; Colby v. Klune, 2d Cir., 1949, 178 F.2d 872; 6 Moore's Federal Practice 207

The attorney for appellants has filed an affidavit in this cause stating that he was the attorney for the present appellants in the first State case. As to this seeming contradiction in the affidavits, appellees have suggested that appellants should bring complaint for their grievances against appellants' attorney.

The attorney for appellants stands ready at any time to account for the discharge of his professional obligations in any court in this country where the matter is raised. But that matter is not raised on this appeal and appellees' suggestion of it should not be used to cloud the matters which are raised by this appeal, one of which is a question critical to the law of res judicata: were the appellants merely formal or ostensible parties to the first State case, or were they actual parties litigant. The appellants and their attorney are now before this Court asking for a day in court in which the trial judge will make a lawful determination of this and the other genuine issues of material fact which exist in this case.

The principle is summed up in the following statement from 6 Moore's Federal Practice, pp. 2257, 2258:

> "Under general basic principles that control the grant or denial of summary judgment, a motion for summary judgment on the basis of a prior judgment should be denied if the prior judgment has no res judicata or collateral estoppel effect between the parties to the present action; or of there is a genuine issue of material fact as to the validity of the prior judgment, its scope and coverage, privity, or whether it was on the merits so that it is controlling in the case at bar."

Appellants renew each and every point set forth in their opening brief and respectfully urge that the summary judgment appealed from be now reversed.

Respectfully submitted:

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RECEIPT OF THREE COPIES OF
the foregoing is acknowledged
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Nos. 20,159-20,174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

v.

SEABOARD FINANCE COMPANY,
SEABOARD FINANCE COMPANY, TRANSFEREE,
SEABOARD FINANCE COMPANY OF LYNWOOD,
SEABOARD FINANCE COMPANY OF MONTEREY,
SEABOARD FINANCE COMPANY OF NORTHERN CALIFORNIA,
SEABOARD FINANCE COMPANY OF COLORADO SPRINGS,
SEABOARD FINANCE COMPANY OF DENVER, TWO,
SEABOARD FINANCE COMPANY OF DENVER, THREE,
SEABOARD FINANCE COMPANY OF DENVER, FOUR,
SEABOARD FINANCE COMPANY OF DENVER, FIVE,
SEABOARD FINANCE COMPANY OF PUEBLO, TWO,
SEABOARD FINANCE COMPANY OF CONNECTICUT, INC.,
SEABOARD FINANCE COMPANY (IDAHO),
SEABOARD FINANCE COMPANY OF TERRE HAUTE, INC.,
SEABOARD FINANCE COMPANY, INC. (MASSACHUSETTS),
SEABOARD FINANCE COMPANY OF FLINT, *Respondents.*

SEABOARD FINANCE COMPANY, ET AL., *Cross Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Cross Respondent.*

On Petitions for Review of the Decisions of the Tax Court of the United States

BRIEF FOR RESPONDENTS AND CROSS PETITIONERS

FILED
NOV 30 1955
FRANK H. SCHMID, CLERK

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Certificate

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Nos. 20,159-20,174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

SEABOARD FINANCE COMPANY,
SEABOARD FINANCE COMPANY, TRANSFEREE,
SEABOARD FINANCE COMPANY OF LYNWOOD,
SEABOARD FINANCE COMPANY OF MONTEREY,
SEABOARD FINANCE COMPANY OF NORTHERN CALIFORNIA,
SEABOARD FINANCE COMPANY OF COLORADO SPRINGS,
SEABOARD FINANCE COMPANY OF DENVER, TWO,
SEABOARD FINANCE COMPANY OF DENVER, THREE,
SEABOARD FINANCE COMPANY OF DENVER, FOUR,
SEABOARD FINANCE COMPANY OF DENVER, FIVE,
SEABOARD FINANCE COMPANY OF PUEBLO, TWO,
SEABOARD FINANCE COMPANY OF CONNECTICUT, INC.,
SEABOARD FINANCE COMPANY (IDAHO),
SEABOARD FINANCE COMPANY OF TERRE HAUTE, INC.,
SEABOARD FINANCE COMPANY, INC. (MASSACHUSETTS),
SEABOARD FINANCE COMPANY OF FLINT,

Respondents.

SEABOARD FINANCE COMPANY, ET AL.,

Cross Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Cross Respondent.

On Petitions for Review of the Decisions of the Tax Court of the United States

BRIEF FOR RESPONDENTS AND CROSS PETITIONERS

I INTRODUCTION

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R 41-112) are not officially reported, but are unofficially reported at 23 CCH Tax Ct. Mem. Dec. 1512 and 1964 PH Tax Ct. Mem. Dec. 1655 (1964).

JURISDICTION

These consolidated petitions for review (I-R 129-131) and cross petitions for review (I-R 132-134) involve federal income taxes for fiscal years ending in 1955, 1956, 1957, and 1958. By his notices mailed to Seaboard Finance Company and fourteen of its subsidiaries ("Seaboard" hereafter) on March 2, 1962 (I-R 1) the Commissioner determined deficiencies in the aggregate amount of some $621,000. (I-R 42-43) Within ninety days thereafter and on May 24, 1962, Seaboard filed petitions for redetermination with the Tax Court, pursuant to Int. Rev. Code of 1954, § 6213. (I-R 1-5) The decisions of the Tax Court, redetermining the deficiencies at about $202,000, were entered on December 16, 1964. (I-R 113-128) The case is brought to this Court by petitions for review filed by the Commissioner on March 10, 1965 (I-R 129-131), and by cross petitions for review filed by Seaboard on April 16, 1965 (I-R 132-134), all within the time prescribed in Int. Rev. Code of 1954, § 7483. Jurisdiction is conferred on this Court by Int. Rev. Code of 1954, § 7482.

QUESTION PRESENTED

Must this Court set aside as "clearly erroneous" the Tax Court's finding of fact that Seaboard paid 70 per cent of the amounts in question as a premium on small loan contracts?

STATUTE AND REGULATIONS INVOLVED

Int. Rev. Code of 1954:

SEC. 167. DEPRECIATION.

(a) **General Rule.**—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * *

Treas. Reg. § 1.167(a)-3 (1956) (amended, T.D. 6452, 1960-1 Cum. Bull. 127):

Sec. 1.167(a)-3 **Intangibles.**

If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. For rules with respect to organizational expenditures, see section 248 and the regulations thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder.

STATEMENT OF FACTS[1]

During the years between 1953 and 1958 Seaboard acquired assets of a number of small loan companies. (II-R 16, 29, 154-55) In all but two of these acquisitions Seaboard purchased all the assets of the selling company. In each case the principal assets acquired were small loan contracts. (Stip. gen.; II-R 17)

The small loan company renders a special service which meets the needs of borrowers who do not need or cannot avail themselves of the services of banks and other major lending agencies. The interest rates charged on large loans would not return the cost of overhead, credit investigation, interest expense, and servicing if applied to loans of under $500. For this reason the laws of the various states allow higher interest rates for loans of small size and relatively short duration. However, to prevent abuse, companies in the business of making such loans are licensed and strictly supervised.

The terms of such loans are governed by law in every state. Maximum interest rates are prescribed on a sliding scale varying inversely with the amount of the loan. For example, in California at the time the contracts in question were made the maximum interest rate on loans

[1] A Stipulation of Facts with Exhibits 1-A through 77-KKK annexed was filed. At the trial three witnesses for Seaboard testified and Seaboard's Exhibits 78 through 88 were admitted into evidence. The Government (hereinafter referred to as the Commissioner) offered no oral testimony nor did it place any exhibits in evidence.

Reference to the evidence will be shown in the brief as follows:

Stipulation of Facts, by paragraph, thus: Stip. 33; Record, by volume and page, thus: II-R 69; Exhibits, by number, thus: Exh. 77-KKK; Exh. 83

of $100 or less was 2½% per month. The rate on the next $400 was 2% per month. (II-R 90, 165) The maximum term of such loans is restricted by the laws of the various states to from 20 to 36 months. (II-R 42,131)

The typical borrower under a small loan contract will require a longer term to repay than the original contract provides, or will need additional money before his loan is fully repaid. This results in "refinancing," or replacing his existing contract with a new one two or three times before the loan is fully paid, making the total loan period about three to five years. (II-R 130,175)

Because of state regulation and the needs of borrowers, small loan contracts have certain unique characteristics which distinguish them from other securities such as bonds, mortgages, debentures and commercial notes. These characteristics are: (1) a comparatively high rate of interest; (2) a comparatively short duration; (3) a borrower with an unproven payment record; and (4) the probability that the borrower will seek to refinance his contract, extending its life to from three to five years.

In all but two of the purchases here involved Seaboard determined the value of the loan contracts it purchased by a method commonly used in the small loan industry called "spreading" the contracts. (II-R 50, 73) Spreading loan contracts consists of an examination of each contract and of the file of information concerning that particular contract and its borrower. (II-R 51) Here the spreading was performed by experienced representatives of Seaboard. (II-R 50)

When performing a spread, the expert lists in columns the identification number of each contract, the name of the borrower, the principal balance due, and assigns a rating or classification of the individual contract. Such

a listing (derived from Exhibit 17-Q) might appear as follows:

SCHEDULE

Account No.	Name	Present Balance	Class
A-1368	Alojipan, S.	$262.31	A+
FV-144	Allen, Don D.	70.88	A
S-1384	Herndon, J. E.	357.92	B
S-732	Harris, Sherman	151.12	C
S-1025	Haxcall, Charles	72.85	D

The usual classification symbols are A+, A, B, C, D, and E. In assigning each contract to a class, the person performing the spread scrutinizes all the information in the file which will give any hint as to the probability that the borrower will make timely payment of his loan. The Seaboard representative pays particularly close attention to the actual payment record of the borrower on the particular contract being scrutinized. (II-R 89-90) He also ascertains the age of the borrower, his employment and salary, his seniority in his job, whether his wife is employed, number of dependents, his monthly budget, his other debts, and the results of any credit check contained in the file. (II-R 231) On the basis of this information he classifies each loan contract in categories A+ through E.

When the Seaboard representative has classified the loan contracts he computes the total of the principal remaining to be repaid ("principal balance") for the contracts in each class. He then adds a percentage premium to the aggregate principal balance of the A+ account contracts and subtracts a discount from the aggregate principal balances in the B, C, D, and E categories. In the purchases involved in this case premiums varied between 15% and 30%. Discounts were typically 25% on the B contracts, 50% on the C contracts, 75% on the D contracts, and 100% on the E contracts. (II-R 56, 62,

198, 229-30) Loan contracts in the A category were purchased at an amount equal to the aggregate principal balance. (II-R 55)

The determination of the premium to be paid upon the A+ contracts depends upon several factors. First, the premium will vary with the effective yield obtainable on small loan contracts under the laws of the state in which the contracts are written. (II-R 89, 92, 231) Because the maximum permissible rates vary from state to state, the effective yield on loan contracts will vary accordingly. (II-R 51, 208, 231) Second, the percentage premium will be higher if the average balance on the loan contracts purchased is low. This results from the fact that the effective yield on low-balance contracts is higher than the effective yield on comparatively high-balance contracts since the interest rate charged varies in inverse proportion to the amount of the principal balance outstanding. See p. 4, *supra*. (II-R 90)

Third, if the overall quality of the loan contracts being spread, compared with contracts in other loan offices, is good the percentage premium will be relatively higher. (II-R 234)

The fourth factor affecting the percentage premium Seaboard pays is supply and demand. If there are competing purchasers for the loan contracts, the Seaboard representative, like anyone valuing a commodity in a competitive situation, may increase the premium in order to be better assured of making the purchase. (II-R 92)

Typically the Seaboard representative who is spreading loan contracts will make a summary sheet at the conclusion of his spread. These sheets (see *e.g.*, Exhs. 78, 84), which were made by persons in the field before the tax treatment of these amounts was drawn into question by the Commissioner, show the actual computation of

premiums and discounts on loan contracts. (II-R 63, 65, 87, 125) The following is a representative excerpt from Exh. 78 showing such a summary sheet:

	TOTAL	A+	A	B	C	D
SPREAD SHEET TOTALS	$152,169.27	73,874.08	63,967.71	8,801.00	4,371.44	1,155.04
GRADING	5,828.86	11,081.11		(2,200.25)	(2,185.72)	(866.28)
NET	$157,998.13	84,955.19	63,967.71	6,600.75	2,185.72	288.76

Loan contracts are worth a premium to Seaboard because they are a profitable investment. They produce a high rate of interest over a five-year period. For several reasons prime quality purchased loan contracts are even more valuable to Seaboard than those which Seaboard itself originates. In the purchase situation Seaboard has better credit information on the borrower in the form of an actual payment history for the specific contract being purchased. (II-R 89-90, 177) Seaboard, therefore, is better able to determine the probability of complete and prompt payment and more accurately to determine the effective yield the contract will produce. Also, Seaboard's effective yield will be increased on a purchased contract because Seaboard will have no expenses for advertising, overhead, and credit checking. (II-R 150, 177)

In 1956 Seaboard purchased approximately $27,000 worth of loan contracts from U. S. Finance Co. in Los Angeles. (Exh. 88; II-R 235) U. S. Finance Co. remained in business, retaining the remainder of its loan contracts, all of its employees, its location and its name. (II-R 237) Seaboard serviced the contracts it had purchased at one of its own offices. Despite the fact that Seaboard received no office location, license, name, personnel, or going business, Seaboard paid a premium for the U. S. Finance contracts identical to that it paid on contracts acquired in purchasing in California the assets of two of the loan offices involved in this case. (II-R

234-37) These were Barnett Car Co., purchased in April 1956 and Rapid Thrift Co., purchased in July 1957.

Seaboard also purchased loans from Gulf Finance Company Mt. Rainier, Inc., paying a premium of 23 per cent though the seller remained in business at its location, retaining its license, employees and the bulk of its loan contracts. (II-R 93-94)

The secured and unsecured loan contracts here in question had useful lives in Seaboard's business of three and five years respectively. (II-R 130)

The Commissioner's Statement of Facts at pages 4 through 8 of his brief is generally accurate. However, at page 5 the Commissioner states that "Taxpayers would not buy an office if they could not acquire the seller's small loan license by transfer." This sentence perpetuates an inadvertent misstatement in the Tax Court's opinion. (I-R 47) Small loan licenses are not transferable and therefore none of the sellers transferred its license to Seaboard. The Tax Court's opinion notes at I-R 56:

> Seaboard did not allocate any part of the purchase price for the acquisition of a small loan license. In each case Seaboard had to apply for and receive a license in its own name before it was permitted to operate at the seller's location. Many of the acquisitions were contingent upon the issuance to Seaboard of a license to Seaboard at the seller's location.

SUMMARY OF THE ARGUMENT

Seaboard, in the years in question, acquired by purchase the assets of a number of small loan offices. The dispute in this case involves a portion of the purchase price which we shall call the "premium." Seaboard asserts that the purchase price of each loan office was equal only to the net value of its assets and that no allowance was made for goodwill. The Commissioner asserts that a certain portion of the purchase price, computed as a premium on purchased loan accounts, was in reality a disguised payment for goodwill. This is an issue purely of fact.

In the Tax Court Seaboard offered more than 120 pages of direct testimony and introduced 88 exhibits into evidence. On the basis of that testimony and those exhibits, Judge Dawson of the Tax Court concluded that 70 per cent of the disputed payments were in fact made as part of the purchase price — as a premium on — loan contracts. On this basis amortization was allowed. This finding of fact by the Tax Court as to the 70 per cent is based upon substantial and persuasive evidence; we believe that it cannot properly be held to be "clearly erroneous" under Fed. R. Civ. P. 52(a).

Seaboard's evidence before the Tax Court showed that none of the disputed amount was paid to acquire employees, licenses, locations, or business names. The testimony of Seaboard's two witnesses with respect to the disputed amounts was lengthy, detailed and explicit. Each of these witnesses testified that the disputed amounts were *in fact* paid as part of the purchase price of the loan contracts. Seaboard's documentary evidence, prepared concurrently with the sale and long before the trial, substantiated the specific statements of Seaboard's witnesses. This testimony and these documents show

that small loan experts will in fact value a small loan contract with a principal balance of $100 at an amount varying from a high of $125 to a low of $25 or $0. The Commissioner has arbitrarily allocated all of the premium (*i.e.*, that part of the price in excess of the aggregate face amounts of the loan contracts) to goodwill.

In effect the Commissioner maintains that the principal balance owing on any given loan contract is the only measure of its value and that each loan contract with the same principal balance must be worth the same amount. The testimony of Seaboard's witnesses reveals a large number of other factors which will affect the value of loan contracts and which may cause two loan contracts with the same principal balance to be worth widely differing amounts. Among these factors are the amount of interest the contract pays, the credit status of the borrower, the saving in indirect loan costs, and the probability that the loan will be refinanced.

Although the typical small loan contract is written for an initial term of between 20 and 36 months, it is usually extended by one or more "refinances" to a total term of approximately five years. Seaboard's use of a five-year useful life with respect to the premiums paid for many of the contracts here involved acknowledges its understanding of the role of this refinance. Indeed, on direct testimony Seaboard's witnesses acknowledged that this attribute of the small loan contract is one which makes it more valuable than it would otherwise be. This is true because of the fact that a contract subject to refinance will remain on the books as an income-producing asset for a longer period than if it could not be refinanced.

Seaboard purchased single items of negotiable commercial paper, having the characteristics which such

paper generally has. One such characteristic is that the maker of the paper will usually seek to refinance the obligation by increasing the amount and/or the term thereof. This characteristic adds value to such contracts, but this is true whether a large number of such contracts is acquired through the purchase of the assets of a small loan office, or a single such contract is acquired. In either case the added value is a characteristic of the paper, and cannot be attributed to the fact that it was written by a certain office or company. Thus it is clear that the premiums paid by Seaboard on small loan contracts were paid for the peculiar value of such contracts and not for goodwill. Such premiums are amortizable just as premiums on negotiable paper generally may be amortized.

Seaboard presented evidence to the Tax Court of the limited useful life of the contracts here involved. Since the Commissioner's brief neither raises the question of limited useful life nor argues that a contract right as such is not deductible, Seaboard has made no argument on those points but will simply direct the Court to Treas. Reg. § 1.167(a)-3 (1956) (amended T.D. 6452, 1960-1 Cum. Bull. 127). These regulations permit a depreciation deduction for the amortization of the cost of intangible assets if the life of the intangible can be estimated with reasonable accuracy. Not only the courts but also the Commissioner concedes that a contract right with a limited useful life is the proper subject of such an amortization deduction. 1954-1 Cum. Bull. 6, *acquiescing in Stewart Title Guar. Co.*, 20 T.C. 630 (1953); 1957-1 Cum. Bull. 4, *acquiescing in Francis E. Latendresse*, 26 T.C. 318 (1956), aff'd, 243 F.2d 577 (7th Cir. 1957), *cert. denied*, 355 U.S. 830, 78 S.Ct. 43, 2 L.Ed.2d 43 (1957).

The Commissioner here argues that this case is an appropriate one for application of the "indivisible asset" rule. The essence of this rule is that where a taxpayer

purchases a bundle of assets as in a corporate acquisition, he cannot separately amortize the cost of customer contracts unless he may separate these contracts from the bundle by proving that they have independent value and that he has paid an identifiable consideration therefor. Seaboard has here met this burden and therefore cannot be denied its deductions under the indivisible asset rule.

On the basis of the evidence below and the authorities the decision of the Tax Court must be sustained.

Should the Court reject Seaboard's argument that the decision below cannot be set aside, Seaboard submits that the evidence establishes that 100 per cent of the premium was paid for loan contracts. The evidence further tends to prove that the sellers from whom Seaboard purchased assets had no goodwill. For these reasons this Court should remand the case with instructions to enter judgment for Seaboard.

II RESPONSE TO COMMISSIONER'S BRIEF

ARGUMENT

THE DISPUTED AMOUNTS WERE PAID BY SEABOARD FOR LOAN CONTRACTS, NOT FOR GOODWILL.

A. The Contested Findings of the Tax Court Are Factual, Are Supported by Substantial Evidence, and Cannot, Therefore, Be Set Aside as Clearly Erroneous.

The Tax Court reported as part of its "Ultimate Findings" the following facts:

> Seventy per cent of the excess consideration paid over the sellers' net book value of the assets sold was attributable to the small loan contracts and 30 per cent of the excess consideration was paid for goodwill and going concern value of the small loan business acquired.

The Commissioner specifies in his brief three alleged "errors," all of which are merely restatements of his contention that the above findings are in error. As such, his contention is not that the court erroneously applied the law, but that the court did not correctly adduce the facts from the evidence presented.

It is a well-established rule of tax law that where a statutory term such as "goodwill," "gift," "value," or "ordinary and necessary" is properly defined so as to establish the criteria for its application, the application of such a term to a particular case is purely a question of fact. See, *e.g., Helvering v. Maytag,* 125 F.2d 55, 62 (8th cir. 1942); *Commissioner v. Heininger,* 320 U.S. 467, 475, 64 S.Ct. 249, 254, 88 L.Ed. 171, 177 (1943). "Whether an expenditure is directly related to business and whether it is ordinary and necessary are doubtless *pure questions of fact* in most instances" (emphasis

added); *Commissioner v. Duberstein,* 363 U.S. 278, 287-291, 80 S.Ct. 1190, 1198-1200, 4 L.Ed.2d 1218 (1960); *Johnson v. United States,* 45 F.Supp. 377, 379 (S.D.Cal. 1941); *Commissioner v. Peterman,* 118 F.2d 973, 976 (9th cir. 1941); *Dunbar v. Commissioner,* 119 F.2d 367, 369 (7th cir. 1941); *Sportwear Hosiery Mills v. Commissioner,* 129 F.2d 376 (3rd cir. 1942); *Lydia E. Pinkham Medicine Co. v. Commissioner,* 128 F.2d 986, 990 (1st cir. 1942); *Hirsch v. Commissioner,* 124 F.2d 24, 28 (9th cir. 1941).

That the question as to whether payments are made for goodwill is purely a question of fact was recognized by the Tax Court in *American Fork and Hoe Co.,* 12 P-H Tax Ct. Mem. 1369, 1371, 2 CCH Tax Ct. Mem. 842 (1943):

> The issue, thus, is . . . whether or not petitioner paid any part of the total consideration for goodwill. . . .
>
> This question is purely one of fact which must be determined from the evidence before us. . . .

That great weight must be given by an appellate court to the determinations of the trial judge in resolving questions of fact is no doubt so familiar to this Court that extensive citation of authorities is unnecessary. Rule 52 of the Federal Rules of Civil Procedure provides in part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses . . .

In *Commissioner v. Duberstein, supra,* the Supreme Court has said at page 291:

> Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc. 52(a), 28 U.S.C.A. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746. *The rule itself applies also to factual inferences from undisputed basic facts,* id., 333 U.S. at page 394, 68 S.Ct. at page 541, as will on many occasions be presented in this area. Cf. Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 609-610, 70 S.Ct. 854, 856, 857, 94 L.Ed. 1097. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I.R.C. § 7482(a), 26 U.S.C.A. § 7482(a). (Emphasis supplied.)

There are at least two important policy reasons for which appellate courts should overturn a factual determination made by the court below only in exceptional circumstances. Even if a present-day appellate judge's work load permitted him to examine a bulky record minutely, he would not have the same opportunity to determine the facts as did the trial judge. Experience tells that a written description of an actual event is a pale and incomplete statement of what actually occurred. One can accurately describe a performance by Yehudi Menuhin as the drawing of taut horsehair over stretched catgut to produce a high-pitched sound. This is an accurate but scarcely complete description of a performance by a violin virtuoso. So, too, a written trial record is a pale and incomplete portrayal of the drama which occurred in the trial court. The reviewing judge cannot reconstruct from the record the nervous laughter, voice

inflection, averted eyes, reddened ears, or sweating hands of the witness. The "clearly erroneous" rule, therefore, is founded partly on the basic fact that an appellate judge, however diligent, can never really *know* the evidence below as well as the trial court can know it. See, *e.g., United States v. Yellow Cab Co.,* 338 U.S. 338, 341-42, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949).

It is sometimes argued that reddened ears and sweating hands are only important when there is contradictory evidence before the trial judge. In *United States v. First Security Bank,* 334 F.2d 120 (9th Cir. 1964), this Court has answered that argument as follows:

> Although the existence of all these factors is not in dispute, and although the trial court's findings do not involve any problem of credibility of witnesses, yet we think its findings are subject to the requirements of Rule 52(a), Fed. Rules Civ. Proc. that they should not be set aside unless clearly erroneous. (At page 121).

Anyone who has seen an able Government attorney conduct a case on a limited budget will understand the merit in the court's ruling. Such an attorney can probe and question the veracity of the taxpayer's witnesses almost as well by use of a searching cross-examination as could be done by the presentation of contrary evidence. In the present case the Commissioner's counsel did in fact draw the testimony of Seaboard's witnesses into question by his cross-examination. (See, *e.g.,* II-R 158, 162, 178)

Thus even where there is no contradictory testimony the trial judge is called upon to determine when the witness has stretched the truth, when he has made convenient omissions, in short when he has lied. This then is the most important consideration urging restraint on

appellate courts: that the appellate judge sees only an imperfect and hazy reflection of what the trial judge saw, sensed and felt.

A second and related policy consideration supporting the "clearly erroneous" rule is that the proper administration of justice requires that the factual determination of the trial court, except in rare cases, must stand. In today's complex society the courts are crowded with deserving litigants. Appellate courts should not foster appeals unless there is a substantial probability that the second sitting will produce a better outcome. Surely the determination of a factual issue is not one of those cases in which the probabilities of a correct decision are greater at the appellate level than at trial.

If the Court applies the "clearly erroneous" test in this case, we believe it can come to only one conclusion: that the finding below was *not* erroneous, but was supported by substantial evidence. The record contains 115 pages of direct testimony by Mr. Weidman, President of Seaboard (II-R 36-151); 12 pages of direct testimony by Mr. Lide, Vice-President of Seaboard (II-R 226-38); and 88 exhibits of Seaboard. All of that testimony and each of those exhibits added in some measure to Seaboard's case. Both Mr. Weidman and Mr. Lide testified in explicit detail about the various purchases and the factors which made the loan contracts worth a premium to Seaboard. (See, *e.g.,* II-R 229-30) The exhibits corroborated that testimony. (See, *e.g.,* Exh. 78, 79, 84, 88) Surely this evidence is "substantial"; certainly no finding in accord with it can be said to be *clearly* wrong.

We submit, therefore, that this case is a fact dispute and little else. Respondent has attacked the truth of Seaboard's contention by explicit questions on cross-examination. If Seaboard's witnesses accurately por-

trayed the transaction involved, Seaboard should prevail; if those witnesses bent the truth, Seaboard should lose. The Tax Court was convinced that Seaboard's evidence established that small loan contracts are more valuable than their face amounts; that evidence was substantial and was not contradicted or qualified. Important policy considerations, the decisions of this Court, and those of the Supreme Court support the doctrine that an appellate court must use great restraint in exercising its power to upset the factual finding of a lower court. On the record presented we believe that the Tax Court's findings cannot properly be said to be clearly erroneous.

B. The Evidence Clearly Establishes That the Loan Contracts Were Worth More Than Face Amount, and That the Contested Payments Were Made as Part of the Purchase Price of Such Loan Contracts. Nothing Was Paid for Goodwill.

Seaboard's position in this case can be summarized in a brief sentence — Seaboard paid more than face value for the loan contracts because they were worth more than face value. This proposition being true, nothing was paid for goodwill. The Trial Court adopted and used the definition of goodwill of Mr. Justice Story quoted in *Metropolitan National Bank of New York v. St. Louis Post Dispatch,* 149 U.S. 436, 446, 13 S.Ct. 944, 948 (1893):

> Goodwill [is] the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for

skill or affluence or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.

If goodwill is the worth of a business exceeding the value of its "capital, stock, funds, or property" then it follows that if a buyer pays only the value of the assets of a business, nothing has been paid for goodwill.

The evidence adduced at trial conclusively establishes that the loan contracts had a value at least equal to the price allocated to them. This evidence can be summarized in the following four categories:

1. Mr. Weidman, President of Seaboard, testified without contradiction or qualification that Seaboard paid no part of the disputed amount for those things which are almost always associated with goodwill. He testified that nothing was paid to acquire the selling company's employees. (II-R 98-104, Exh. 80) Seaboard did not use the name of the selling company after the purchase in any case. (II-R 104) Finally, he testified that Seaboard paid no amount for the acquisition of any of the seller's locations or leases. (II-R 109, 110) Thus the evidence is clear that Seaboard paid nothing for name, location, or personnel, the attributes which are commonly associated with goodwill.

Rather Mr. Weidman and Mr. Lide, men of extensive experience in the consumer finance industry, testified that the disputed amounts were paid as premiums on — as part of the price of — loan contracts. Each of them explained in explicit detail the method by which Seaboard valued the loan contracts to be purchased and the reasons for such valuation. (II-R 53 *et seq.*, 233 *et seq.*)

The unsophisticated person may be likely to value an imitation pearl for the same amount as a genuine twin, yet the expert jeweler instantly recognizes characteristics which make the authentic pearl worth hundreds of dollars more than its spurious but apparently identical twin. Likewise, the unsophisticated layman may regard one loan contract calling for the payment of a given principal balance at a given rate of interest as roughly the equivalent of every similar loan contract. However, a consumer finance expert may value one such contract at 25% of the principal balance and value the other at 125% of the principal balance.

The process of "spreading" or evaluating loan contracts gives striking examples of this disparity in value. Before the purchases here involved, a representative of Seaboard inspected and evaluated *each individual* loan contract to be purchased. (II-R 50, 52) In the course of this examination an expert from Seaboard examined the file the seller kept on each of its loan contracts. This file contained all the credit information on the obligor and would include a record as to the timeliness and number of payments which the obligor had made on the loan contract. In the typical case here involved, Seaboard's expert valued some contracts at 115-125% of face (A+); some at face (A); and others at 75% (B), 50% (C), and 25% (D) of the amount of principal owing on that contract.

The value Seaboard placed on each loan contract varied in proportion to its estimation of the credit situation of the obligor. Mr. Lide, who often "spread" accounts, testified that he determined this credit status by looking at:

> [The obligor's] age, his type of job, his position on the job, length of service on the job, whether his wife works; does he have a big family — a number of dependents.
>
> We want to determine the amount of the payments in relationship to his income to see that he can pay the payments comfortably, without any hardship, and you want to look at his past credit records and his record of paying on the account involved. (II-R 231)

After Mr. Lide had evaluated all of these factors as an expert he placed a value on the loan contract.

Both Mr. Lide and Mr. Weidman testified that the Seaboard experts did *in fact determine that specific loan contracts had a value greater than the face or principal amount owing on those contracts.* This testimony was unimpeached and not contradicted. The Commissioner offered no experts to refute this point. These facts stand as persuasive support for the finding of the court below — that the disputed amounts were *in fact paid for* loan contracts. Indeed, a finding to the contrary would be clearly erroneous.

2. Examination of certain of Seaboard's exhibits provides even more convincing evidence that Seaboard did in fact determine that the value of certain individual loan contracts was higher than their face amount. For example, the Court's attention is directed to Exhibits 17-Q and 78. 17-Q is a representative part of the 11-page list of loan contracts attached to the purchase agreement. Each loan was evaluated as "A+" through "D" before it was added to the list. Exhibit 78 is a tabulation of the evaluated loans. It shows the addition of a premium to

the A+ accounts and the subtraction of a discount varying from 25% to 75% from others.

These are not documents prepared by a tax expert with a view toward future tax avoidance; they are actual documents prepared concurrently with the purchase by experts in the loan field having no training in corporate taxation. (II-R 63) Yet these documents show the actual valuing of individual loan contracts by number and balance; they show the addition of a premium and the subtraction of a discount from specific loans. They are entirely consistent with the testimony of Mr. Lide and Mr. Weidman and with the finding of the Tax Court. They are inconsistent with the Commissioner's argument. The Commissioner offered no evidence to refute the values listed on these worksheets.

3. Most of the purchase agreements provided for a basic sales price based upon the value of loan contracts outstanding at the time the agreement was signed. In most cases the purchase was not consummated until some later time. Typically the purchase agreements provided for a price adjustment for loans which were paid in part or in full and for new loans which might be made between the time of the signing of the agreement and the final settlement. One of these agreements (Exh. 6-F) calls for the reduction of the total purchase price by 127½% of the amount which any debtor pays on an A+ contract between the time of the agreement and the time of the final settlement. Another calls for Seaboard's purchase of new A+ accounts by paying the principal balance plus an additional amount equal to "25% of the balance." (Exh. 57-EEE) Another seller (Exh. 26-Z) agreed to repurchase bad loan contracts from Seaboard by the payment of the

principal amount due "plus the amount of bonus paid therefor."

Each of these agreements contemplated the addition or subtraction of a specific amount of premium with respect to *each single* loan contract which should be repurchased, added, or paid in the period between signing of the contract and closing the transaction. If the premium were in fact a disguised payment for goodwill and not payment for specific loan contracts, it is unlikely that the parties would have gone to the trouble to make such minute and complex adjustments. The addition or subtraction of a few loan contracts could not cause the value of any existing goodwill to fluctuate significantly. Had the premium been simply a disguised payment for goodwill, these adjustments would have been unnecessary.

4. Perhaps the most persuasive evidence in this case is the purchase of contracts by Seaboard from U. S. Finance Co. and from Gulf Finance Mt. Rainier, Inc. In these purchases Seaboard acquired only a portion of the loan contracts owned by the seller. Seaboard took over none of the sellers' employees nor did it do business at the sellers' location or acquire the sellers' names. The sellers remained in business at their former addresses with most of their existing customers. All Seaboard received from the sellers were certain of their high quality loan contracts. Despite these facts Seaboard paid a 15% premium for A+ accounts of U. S. Finance Co. (II-R 235-37) and 23% for A+ accounts of Gulf Finance (II-R 94). The U. S. Finance Co. premium was the same as that which Seaboard paid at about the same time in its purchase of loan contracts from the Barnett Car Co. (I-R 25; Exh. 84, 195; II-R 126

et seq.) and Rapid Thrift Co. (Exh. 78 and 17-Q; I-R 24) In the two latter cases, Seaboard in fact took over the office location of the seller and some of the seller's employees. In addition Seaboard acquired licenses in its own name at these same locations in which the seller had formerly been doing business.

Although Seaboard acquired no place of business, no employees, no license, none of the common attributes of goodwill from U. S. Finance, it paid U. S. Finance and Gulf Finance premiums identical to or higher than that which it paid in the acquisition of the assets of going businesses. This, like the foregoing bits of evidence, corroborates the testimony of Seaboard's witnesses: *that the loan contracts are actually worth a premium,* that this additional value inheres in the loan contract and is not separable from it.

If the Commissioner is to prevail he must succeed where he failed below. He must convince this Court that Seaboard paid for goodwill, not for loan contracts. He must show that Mr. Weidman and Mr. Lide are either incompetent to value small loan contracts or dishonest; that Exhibits 17-Q and 78 are fabrications; that references in the purchase agreements to premiums are a ruse; that the U. S. Finance Co. and Gulf Finance Co. cases are aberrations. We believe that such a finding would be an injustice to the able court below and would do violence to the record presented.

C. The Expenditures In Question May Be Recovered Through Amortization Because They Represent The Cost Of Wasting Assets With Determinable Lives.

The Commissioner in his brief goes to great lengths to classify the premium payments here in question as the cost of purchasing goodwill. His contention apparently is based upon the assumption that once this onerous label is fastened upon these expenditures, the law positively prohibits their recovery through an allowance for exhaustion. This reasoning fails to recognize the reasons for which the regulations and cases prohibit depreciation of the value of goodwill.

Section 1.167(a)-3, quoted at page 3 of this brief, makes clear that the propriety of amortizing the value of intangibles depends upon the ability to prove that such intangibles have a determinable useful life. The section's fiat that "No deduction for depreciation is allowable with respect to goodwill" is simply a statement of the generally-held position that goodwill is so ephemeral, so lacking in substance that its useful life cannot be estimated, and therefore neither the rate nor fact of exhaustion can be determined. As the court said in *Dodge Brothers v. United States,* 118 F.2d. 95, 100 (4th Cir. 1941):

> . . . goodwill is not a deductible item in the computation of a taxpayer's net income. . . . This form of deduction has been denied because of the manifest difficulties inherent in the computation of both the life span and value of this intangible asset.

The Commissioner has not in this appeal contended that the trial court wrongly determined that the value of the payments in question, including that portion if any which was paid for the prospect that the loans would be refinanced, would be exhausted in three or five years.

Thus it may be assumed that he concedes that the useful life of this asset (probability of renewal) was correctly determined by the court. Once the determination is made that an intangible asset is a depreciating one with a determinable life it becomes irrelevant what name is assigned to the asset. "Premium," "cost of purchased contracts," "goodwill" or other such titles are useful only insofar as things generally falling into such classes may be said to have the characteristics of the class.

Seaboard does not for a moment concede that the premium can by any stretch of the imagination be called a payment for goodwill, but even if it were so classifiable, the clearly established value and determinable life of the premium would make it a depreciable asset within the meaning of the Code. Thus in conceding that what he calls the prospect of "continued patronage" will end in three to five years, the Commissioner concedes that it falls in that class of intangibles for which a depreciation deduction is available under Section 167, regardless of the name he chooses to apply to the asset itself.

The Commissioner relies primarily upon dicta from *United Finance and Thrift Corp. of Tulsa v. Commissioner,* 31 T.C. 278, 286 (1958), aff'd 282 F.2nd 919 (4th Cir. 1960); cert. denied 366 U.S. 902, 81 S.Ct. 1045 (1961) for the proposition that the payments here in question represent goodwill. In that case the taxpayer had purchased the assets of a small loan company for a lump sum. A portion of this sum was allocated to a covenant not to compete in the purchase contract. The taxpayer deducted an allowance for exhaustion of the "covenant" on its return, and the Commissioner contended that the entire cost of the covenant was a disguised payment for goodwill. The Tax Court stated the issue in *United Thrift* as follows:

> The primary issue for our consideration is purely a factual one; namely, whether the State Loan Company (Oklahoma) . . . paid a consideration for *covenants not to compete* with their business in a designated area as a distinct and *severable item* at the time it purchased the tangible assets, including certain ledger loan accounts, of two small loan businesses . . . and if so, the amounts to be attributed to such covenants not to compete. (At page 284. Emphasis added.)

Thus, the issue in *United Thrift* was not, as here, what was the value of the purchased loan accounts. The court specifically noted that

> As to the amounts paid for the tangible assets (mainly petty loan accounts) as such, *neither party raises any question* and we have no doubt that those amounts were reasonable and correctly represented in the contracts. (At page 286. Emphasis added.)

It cannot be determined from the opinion whether the price of the purchased loan accounts included a premium on the high quality loans, and thus the case is of no assistance whatsoever in determining the issues properly before this court. The sole question there was the propriety of allocating a portion of the consideration to covenants not to compete.

The Commissioner relies heavily upon the court's passing remark that the prospect of renewal financing by loan contract borrowers was "the significant factor in connection with goodwill." This reliance gives weight to a portion of the opinion which it cannot be given. No evidence was produced on the question as to whether the prospect of renewal was a characteristic of loan contracts whether purchased singly, in bundles, or as part of an acquisition of a loan company. The court did not go beyond noting

that there was present a prospect of continued patronage, and remarked gratuitously that this might be considered goodwill.

The court in *United Finance* was under no necessity of deciding what the amounts *not* paid for the seller's promise not to compete were paid for. In the absence of clear and convincing proof to the contrary by the taxpayer the court was required to sustain the Commissioner's contention that the payments were for goodwill. (Rule 32, Tax Court Rules of Practice) The court attributed more than half the amounts in question to the covenants not to compete and denied a deduction as to the remainder.

What the court might have held if the taxpayer had offered proof that the payments were made as a premium on loan accounts is not worth our speculation. The fact that it did not decide the question is sufficient to establish that the case is no authority for deciding *this* case.

It is worth noting that the Commissioner relies so heavily on the *United Thrift* case for a point which was not before the court, and for which, therefore, the case is not authority, yet distinguishes the case of *North American Loan and Thrift Co. No. 2 v. Commissioner,* 39 T.C. 318 (1962), affirmed 319 F.2d 132 (4th Cir. 1963). The court in that case, says the Commissioner, did not decide the question of the propriety of amortizing a premium paid on small loan accounts, and therefore its apparent concession that the loan accounts were worth a premium is not authority for that proposition. It is difficult to see why the court's implication that loan renewals may be goodwill in *United Thrift,* where the court did not even consider the value of the contracts themselves, is authority for the Commissioner's case whereas *North American Loan,* a case in which proof of the value of such contracts was primary, is not authority on this subject.

Seaboard concedes that neither case is a direct holding on the question of the value and classification of loan contracts and their prospective renewal features. However, if weight is to be given to either case, *North American Thrift* is the only such case in which the issue here involved was in any way considered by the court.

In *North American Thrift,* there is nothing to indicate that, as here, the buyer of a small loan company actually spread the accounts and valued them separately in arriving at the purchase price. Nevertheless the buyer did pay an amount in excess of the book value of the assets and deducted on its return for the year in question an allowance for exhaustion of a part of this amount as "amortized premium on loans purchased." The petitioner proved at trial that the purchased loans (all one year loans with terms remaining of less than one year) would have a life of fourteen months due to renewals, and the court so found.

The court noted that "the evidence tends to support petitioner's original position on its books of account and on its return for 1952 that the amount capitalized was in fact paid as a premium for the 611 loan accounts acquired from Georgia Finance . . . " The petitioner, however, did not prevail because the 14 month life of the accounts had expired before the year in which the deductions were taken. The court was, however, for purposes of decision willing to assume that such premiums are amortizable.

It should be noted that the Commissioner in this appeal concedes that premium payments are amortizable since he does not here contend that the Tax Court erred in so determining. He is solely contending that the Tax Court erred in determining that the amounts in question were in fact premiums rather than payments for goodwill.

Since he is willing to concede the Tax Court's assumption in *North American Thrift,* the Commissioners' attempt to distinguish that case falls flat. The Court indicates clearly that if it reached that point it would make the finding that the amounts in question were paid as premiums on the loan accounts. Once this is decided the Commissioner must concede that such amounts were amortizable.

Seaboard's case is much stronger than that in *North American Thrift.* Seaboard has introduced clear and convincing proof that the loan contracts purchased were worth a premium, that it separately valued and ascertained the amount of such premium, and that it in fact paid a premium for the contracts. In addition, Seaboard proved the life of the contracts and the court so found. Seaboard amortized such premiums over the useful life of the contracts and took deductions for exhaustion in the appropriate years. On the basis of such proof and the total absence of proof to the contrary, the holding below must be sustained. The premiums were paid for wasting assets with ascertainable lives, and, therefore, the cost may be recovered through amortization.

The tax law has long recognized that mortgages, bonds, notes, and other commercial paper representing loans at interest may at times command a premium in the market place. This happens so frequently with the trading of corporate bonds that there is a specific section (§ 171) dealing with premium amortization. It is obvious that buyers would be paying tax on a portion of their purchase costs, as well as on their profit if they were forced to treat premium as an unamortizable capital expenditure, rather than deducting it from income.

The Commissioner himself recognizes this fact as is clearly demonstrated in Revenue Ruling 258, 1953-2

C.B. 143. There the Commissioner holds that where certain insurance companies purchased F.H.A. insured mortgages "from the original lenders at a 'premium' (*i.e.*, at a price in excess of the principal amount of the mortgage notes)" such premiums could be amortized over the remaining life of the mortgage contracts.

Surely this rule would not vary if an insurance company purchased all, rather than some, of a lender's mortgages. If in fact a premium is paid for a mortgage it should make no difference whether the mortgage was purchased singly or as part of an asset acquisition.

The loan contracts in this case are simply a species of commercial paper representing bona fide loans at interest. Because of their high interest rate and other characteristics they can command a premium. Seaboard paid premiums for the loan contracts acquired herein, and like other purchasers of securities at a premium. Seaboard should be permitted to recover this cost in computing its income from such investments.

D. The Prospect Of Refinancing Is Simply A Valuable Right Accompanying A Loan Contract. Unlike Goodwill, It is Not Associated With The Continued Existence Of Any Business.

The Commissioner asserts that the payments in question must have been for goodwill because they obtained for Seaboard the probability of refinancing, which, he says, is equivalent to continued patronage, which, he says, is always goodwill. To sustain this line of reasoning, the Commissioner contends that the fact that customers will return is conclusive proof of goodwill, regardless of the circumstances effecting their return.

It should be noted here that the Commissioner is mistaken in his assumption that the sole reason for the payment of premiums on the loan contracts was "because those were the accounts that would be refinanced and remain on the books for a longer period than the term remaining when purchased." (Comm'r's Brief at page 16) Seaboard concedes that the probability of refinancing contributed significantly to the value of these contracts. Nevertheless, because of the high interest rate and quality borrowers, such contracts would be worth a considerable premium even if the borrower did not refinance. It is not necessary to use mathematics to see that the rate of return is much higher than that yielded by most investments.

Refinancing was only one of the factors contributing to value. The testimony at trial, particularly that of Mr. Weidman, established that the factors which made the contracts worth a premium were, among others: (1) the effective interest rate of the particular contract, (2) the probability that the contract would be paid promptly and in full, (3) the period of time over which refinancing could be anticipated, and (4) probable collection expense. The Commissioner does not, however, argue that any of the evaluation factors other than the prospect of refinancing are indicia of goodwill.

The Commissioner's position that wherever there is a probability of repeat business in a transfer of assets there is a sale of goodwill is based upon a phrase taken from the opinion of this court in *Boe v. Commissioner,* 307 F.2d 339, 343 (9th Cir. 1961). This was the court's generalization of a complex idea as follows: "To us, the essence of goodwill is the expectance of continued patronage, for whatever reason." Taken by itself, this statement would suggest that when one buys any supply or

manufacturing contract he has purchased goodwill since during the life of the contract he will continue to have customers. Unfortunately the Commissioner, like all who apply general statements without regard for the underlying reasoning, has extended the scope of this statement to an area which it does not cover. Counsel is certain that this court did not mean to suggest that every means by which repeat custom may be obtained is goodwill.

The definition of goodwill quoted at page 19, *supra,* from *Metropolitan National Bank of New York v. St. Louis Post Dispatch,* clearly states the Supreme Court's view that goodwill is the worth of a business which exceeds the value of its assets, and that it is primarily a predilection on the part of customers freely to return and patronize the business for reasons which seem sufficient to them, even from prejudice. This definition has been quoted in many cases, a few of the most recent of which are *Barron v. Commissioner,* 334 F.2d 58, 61 (5th Cir. 1964); *Noerr Motor Freight Inc. v. Eastern R.R. Presidents Conference,* 155 F.Supp. 768, 810 (E.D.Pa. 1957); and *Estate of Masquelette v. Commissioner,* 239 F.2d 322, 325-26 (5th Cir. 1956).

That goodwill is not a compulsory contract right is clearly implied by the court in *Van Iderstine Co. v. Commissioner,* 261 F.2d 211, 213 (2nd Cir. 1958):

> The "goodwill" that is the subject of purchase and sale always involves the relations of the seller with third persons Such relations *have no existence apart from the feelings, habits, and desires of these third parties.* (Emphasis added)

From this one must reason that if the third parties are compelled by contract or other considerations wholly apart from their "feelings, habits and desires" to resort to a particular business, their custom is not goodwill.

Where a seller has a power to compel buyers to patronize him whether they wish to do so or not he does not need nor possess goodwill.

The court in *Dodge Brothers v. United States, supra,* at page 100 says:

> Goodwill cannot be carved out of a business and sold independently of the going concern; for its tangibility and its value exist only to the extent that such tangibility and such value are connected with a going business.

Thus, a patronage which can be sold piecemeal, while the owner remains in business at his old location with his same name and same business, cannot be goodwill. The customers are transferred whether they will or no, even if they prefer to deal with the old business. If a customer is bound by contract to patronize a business and that contract is transferable, his patronage may be sold, but this is the sale of a contract right and not of goodwill.

The small loan contracts which Seaboard purchased bound the borrowers to repay a fixed sum over a definite period. This they must do for a transferee even though they might have preferred to continue to do business with the transferor. When these persons needed additional funds they were faced with two choices, incur a new debt or refinance the old. If they incurred a new debt they would be paying a higher interest rate than if they refinanced because a greater portion of their total debt would fall in the lower ranges where state laws allow higher interest rates. In addition, in applying for the new loan they would have to list the old loan among their debts which would restrict their ability to borrow elsewhere. Thus it is clear that the borrower under a small loan contract is, to use the vernacular, "hooked." Until the loan is paid he will be most likely to patronize

the owner of his contract regardless of whether the original lender remains in business or whether he prefers to deal elsewhere.

This is the significance of the fact that Seaboard paid premiums for the loan contracts of U. S. Finance Co. and Gulf Finance Co. Mt. Rainier. Seaboard knew that among the things which made such contracts valuable was the fact that the obligors would refinance them with the owner on an average of two to three times. Seaboard also knew that this would occur despite the fact that the original lender remained in business and the borrower probably preferred doing business with the original lender. Since the customer was transferred apart from the business, by definition goodwill was not involved. The fact is that sale of the loan contracts, not transfer of goodwill, brought the customers to Seaboard for a period of three to five years.

In *Merchant's Acceptance Company v. Commissioner,* 23 CCH Tax Ct. Mem. 896, P-H Tax Ct. Mem. ¶64,149, the Commissioner, as seems frequently to happen, was arguing precisely the opposite proposition which he is urging before this Court. In that case the petitioner was a loan company which had acquired and held in the ordinary course of business a large number of small loan contracts. The petitioner sold its prime notes and office furniture to "a large commercial finance company." The buyer paid a premium above the principal balances outstanding for these notes.

The seller argued that the entire amount of the premium was capital gain because it was not specifically excluded from capital gains treatment by section 1221. In the alternative the seller argued that a part of the premium was paid for goodwill and thus taxable only at capital gain rates. The Commissioner successfully argued that assets were a part of inventory and gain there-

on was ordinary income. Furthermore, the premium was not paid for goodwill *because it was entirely attributable to the sales price of the loan contracts.*

Now that the Commissioner has eaten his cake in the *Merchant's Acceptance* case he seeks to have it in this case. It is perfectly obvious that if there is any tax avoidance here it is on the part of the sellers who transferred their loan contracts to Seaboard. The gain on the sale was income to them in lieu of the interest they would have collected had they retained the contracts. But to Seaboard the premiums represent a cost which it is entitled to recover before computing its income on the transactions.

Since Seaboard has no knowledge to the contrary, it presumes that the sellers paid tax on the premiums as ordinary income. Now the Commissioner seeks a double tax by forcing Seaboard to take a portion of the purchase price of the loan contracts into income.

The Commissioner makes much in his brief of the fact that by purchasing the loan contracts here in question Seaboard avoided the initial losses which are usually experienced in opening new offices. This, he says, is proof of the existence of goodwill because a profitable patronage was immediately obtained. This argument ignores the fact that all "startup" costs would have been deductible as business expenses when incurred and recoverable as loss carryovers against future profits when the office became profitable. Thus, the very expenses he admits Seaboard avoided would have been recoverable by appropriate tax treatment. Yet, the Commissioner contends that the cost of avoiding these deductible expenses is not deductible.

The businesses from whom Seaboard purchased loans had spent money for advertising, overhead, credit reporting, and other costs in obtaining these loans. *The actual cost to the seller of these loans exceeded the face amount.* Therefore, to a buyer who need incur no selling expense to obtain the loans, they were worth a premium. In effect Seaboard paid its startup costs as a premium rather than as salaries, rent, advertising expense, etc. It should be allowed to amortize such costs to provide the equivalent deduction. Only if the price paid exceeded the true value of the loans (including their prospective renewal feature) should any goodwill be found present.

Nothing in the tax law prevents a supplier from buying at a premium contracts of another to keep his business operating at a profit. Only if he cannot prove the value and life of the contract can he lose his right to amortize. Seaboard has amply demonstrated that no part of the purchase price of the contracts can be attributed to goodwill. Seaboard paid the value of the contracts and has proved they have a definitely ascertainable life.

E. The Loan Contracts Purchased By Seaboard Were Individually Examined, Valued, And Purchased. Seaboard Paid Nothing For The Existing Customer Structure Of A Business.

At page 20 of his brief, the Commissioner introduces his contention that this case is appropriate for the application of the so-called "indivisible asset" rule. He cites as authorities a large number of cases in which it was held that the taxpayers failed to prove either the cost of specific contracts for which amortization was claimed or the life of such contracts, or both. In most of these cases the courts found that the taxpayers had failed to sustain their burden of establishing that they had paid a specific

consideration for the contracts in question. Upon the failure of such proof, the courts, being unable to determine any separately identifiable amount to amortize, denied the deduction. The cost of the assets was "indivisible" from the general purchase price. These cases involved situations just the opposite of that here. Here specific cost and life have been specifically proved, taking the loan contracts outside the indivisible assets rule.

It would not be practical to analyze and demonstrate the inapplicability of each of the cases cited by the Commissioner at pages 20 and 21 of his brief. Three of these cases are particularly important in the development of the "indivisible asset" rule. The rest turn almost solely on failure of proof. These three are *U. S. Industrial Alcohol Co. v. Commissioner,* 42 B.T.A. 1323 (1940) aff'd 137 Fed. 511 (2nd Cir. 1943); *Thrifticheck Service Corp. v. Commissioner,* 33 T.C. 1038, aff'd 287 F.2d 1 (2nd Cir. 1961) and *Boe v. Commissioner,* 35 T.C. 720 (1961), aff'd 307 F.2d 339 (9th Cir. 1962). We will comment briefly on each of these.

The opinion in each of the three cases is carefully drawn to insure that the "indivisible asset" rule is not used where it does not apply. The first and most important limitation upon the rule is stated in *Thrifticheck,* wherein the Tax Court specifically distinguished the situation there involved from that in which the taxpayer buys contracts with a determinable life calling for a fixed payment:

> It should be pointed out that the purchase here in question *is not similar to the purchase of a contract or contracts calling for the payment of the determinable amount of income over an ascertainable period.* There was no minimum of service which each bank undertook to receive and pay for. The amount of

income which would result from any individual contract would depend upon the number of customers of the bank who might elect to use the Thrifticheck system. P. 1047. (Emphasis added)

Similarly the Tax Court in *U. S. Industrial Alcohol Co., supra,* points out that the "contracts" purchased were, as a practical matter, unfilled orders; they were not binding contracts which "contributed in any substantial degree to the value of the business.":

> We conclude that under the present facts the significance of the contracts lies not in whether or not they were legally enforceable, but in whether petitioner can be regarded as having acquired them with any idea that they would be enforced, or *that their enforceability, if any, had value for it, or that this quality contributed in any substantial degree to the value of the business for which the purchase price was paid, so that any significant sum could be attributed to it.* Under the circumstances stated, bearing in mind particularly that the prices fixed in the sales contracts were concededly at or below market, we are unable to come to the latter conclusion; but, on the contrary, are satisfied that the participation of the contracts in the present transaction was noteworthy in the same way as was apparently recognized generally in the industry; that is, that, for the purpose of determining their cost and relationship to Kentucky's business and petitioner's purchase of it, they are to be treated as of no different consequence than unfilled customer's orders in other lines of business. pp. 1344-5. (Emphasis added)

These two cases, two of the most important in the development of the doctrine, circumscribe the rule and find it to be inapplicable to assets which are binding

agreements to pay money or render other valuable services. In short, they limit the doctrine to a *class of assets* like customer lists and to contracts which in practical effect are like customer lists.

Seaboard's purchased loans are not within the class of asset to which the doctrine is limited in the passages quoted above. Seaboard purchased contracts calling for a "determinable amount of income" over an "ascertainable period." It did not purchase "unfilled customer's orders." A loan contract is the antithesis of an unfilled order or an unenforceable contract. Unquestionably the contracts had "substantial . . . value;" the Commissioner admits as much. They are not within that class of asset which the court in *Thrifticheck* so carefully circumscribes.

That the doctrine does not apply to contracts and similar intangible assets which have identifiable and real value apart from goodwill is substantiated by two recent Tax Court decisions. In *North American Service Co.*, 33 T.C. 677 (1960), the taxpayer was permitted to amortize the cost of a large group of contracts with its customers. In *Savings Assurance Agency, Inc.*, P-H Tax Ct. Mem. ¶63,052; 22 CCH Tax Ct. Mem. 200, deduction, through amortization, of the cost of an insurance agent's customer list was permitted. In the latter case the court distinguished the *Boe, Thrifticheck,* and *U. S. Industrial Alcohol* cases, finding that the customer list had substantial value entirely apart from goodwill because of the circumstances of the case. In the former case the contracts had value because the seller had incurred most of the expense, but had received only part of the income, attributable to the contracts. The loan contracts here involved have a more substantial and apparent value than did the intangibles in either of the two cited cases. In this case the sellers had run the credit check; loaned the money; and

had sold to Seaboard contracts which were ripe for harvest with little additional expense.

A second exception to the "indivisible asset" doctrine is indicated by the following language in the *Boe* case:

> Petitioner has shown us *nothing to indicate that the contracts here in issue were not a collective, single asset.* In fact, the record is most persuasive that they were. We note, *inter alia,* that the 1947 sales agreement identified its subject matter as "the contract medical practice"; it provided an option for termination in vendor if the "membership" (the original 8,984 contracts *plus contracts thereafter acquired*) fell below 50 per cent of the membership transferred, and it refers to this right as an "option to re-acquire and repossess the said practice." The sales agreement *nowhere attempts to value individual contracts or treat them as separate units* and in its attached "Exhibit C" it provides for dissolution payments to members of vendee partnership based, not upon number of contracts, but upon "an amount equal to the share of the net income of the business for the year of such [event of dissolution] and for each of the two fiscal years next thereafter ensuing." p. 725. (Emphasis except that in parenthesis added)

Here the court suggests that if the taxpayer can show that his price was actually based upon the value of the contracts in question and that he made an effort to value them individually, then the doctrine will not bar a depreciation deduction.

This exception fits Seaboard's case as perfectly as does the "asset" exception. In every purchase Seaboard placed a value on the specific loan contracts in each office.

Other evidence in the record demonstrates that Seaboard was interested in individual loan contracts and

valued them individually. First, there are the schedules attached to Exhibits 8-H, 15-O, 17-Q, 19-S, 20-T, and 57-EE which were stipulated to be representative of those attached to almost all the other contracts. [Stip. 7] These list each contract by number, borrower's name and balance. Second, there are the summaries reflected in Exhibits 78, 79 and 84.

In *Boe* the court said: "Petitioner has shown us nothing to indicate that the contracts here in issue were not a collective, single asset." Here Seaboard has presented every possible kind of evidence to the effect that small loan contracts are not fungible; that Seaboard typically placed a specific value on every purchased contract; that it did so in the purchases here involved; and that two loan contracts which to a layman may look alike may in fact differ in value to the sophisticated buyer by a wide margin. We submit, therefore, that Seaboard fits within a second exception to the indivisible asset rule in that it did in fact value and purchase the contracts individually insofar as that was possible.

The Commissioner's acts, in contradiction to his words; acknowledge that the present case is quite unlike *Boe, Thrifticheck,* and *U. S. Industrial Alcohol.* In those cases the taxpayers were required to capitalize the costs of the intangibles involved; in none was the taxpayer permitted to recover his costs by depreciation or by exclusion from income. Presumably those taxpayers would be permitted to recover their costs only upon the sale or other disposition of the intangibles involved. The cost in each case was treated like an investment in land or in some other non-depreciable tangible asset.

The Commissioner's position here departs from his position in those cases. Here the Commissioner has not questioned Seaboard's right to recover free of tax an

amount equal to the principal balance of the purchased contracts. This departure can best be analyzed by reference to the hypothetical example given by Mr. Weidman. (II-R 213) He assumed a typical situation in which Seaboard pays $315 for three loan contracts. One it values at $90; one at $100; and one at $125. For accounting convenience $300 would be charged to "accounts receivable" and $15 to the "premium" account. That part of the cost charged to "accounts receivable" would be recovered without payment of tax simply by excluding that amount from income as it was received from the borrowers. The premium would be amortized and deducted. Although the Commissioner is aware of this process, he has not questioned the tax-free recovery of the $300; he has questioned only the amortization deduction.

The indivisible asset doctrine *assumes* that the premium is but a part of the cost of the loan contract. If these contracts together constitute one mass asset which fluctuates but does not decrease in value, how can Seaboard be permitted to recover $300 of its cost tax free? What ground is there for distinction between two parts of the cost of one asset? If the asset is not wasting, Seaboard is entitled to recover none of its cost by deduction or exclusion; if the asset is depreciating Seaboard is entitled to recover its entire cost over the asset's life.

In *Boe, U. S. Industrial Alcohol Co.,* and *Thrifticheck* the Commissioner's acts were consistent with his theory; in those cases the taxpayer recovered none of its cost by depreciation or exclusion from income. Here the Commissioner's allowance of the tax-free recovery of most of the cost betrays his disbelief in his own argument. This inconsistency in the Commissioner's position is further persuasive evidence that the indivisible asset rule does not apply to debt obligations such as those here involved.

Finally, the rationale and purpose of the so-called indivisible asset doctrine negates its application in this case. When a taxpayer purchases a business consisting of a variety of tangible and intangible assets he frequently pays more than the book value of the assets. The taxpayer may be motivated to value the depreciable assets at the highest possible figure and to allocate what is in fact a payment for goodwill to some asset such as a customer list so that he can at least attempt to recover that amount by depreciation.

This type of tax-avoidance was likely involved in *U. S. Industrial Alcohol Co.* where a large value was assigned to contracts for the right to sell at less than market price, a right whose value is questionable at best. The *Boe* and *Thrifticheck* cases involve similar attempts to infuse some value into assets which had no existence independent of goodwill and no value whatsoever except as an integral part of the business. In each of these cases the indivisible asset doctrine provided a useful tool to strike down a depreciation deduction for an amount which should properly have been allocated to goodwill.

That the doctrine does not and cannot apply to certain assets is indisputable. Where the asset acquired has an independent and substantial value, the rationale and purpose of the doctrine would be thwarted by its application. A taxicab company would not be denied a depreciation deduction on its taxicabs under the mass asset theory simply because it started business by acquiring another company's taxicabs *en masse* and because the total number of taxicabs thereafter remained relatively constant. Yet unless this rationale and purpose place some limits upon the doctrine's application, it would necessarily extend to the taxicab situation as an "indivisible mass asset" purchase.

The present case does not involve tax-avoidance of the kind the rule was designed to prevent. It cannot be disputed that the debt obligations here purchased, like the taxicabs, had substantial value entirely apart from a going business. Both the oral and the documentary evidence presented by Seaboard show that Seaboard in fact valued the loan contracts in the manner indicated in the taxicab example discussed above. The summary sheets which are in the record as Exhibits 78, 79 and 84 show explicitly that the purchased contracts were valued at more than the principal amounts owing on them. Those sheets were prepared by persons with the limited responsibility of evaluating the assets to be purchased. It was not their responsibility to consider income tax consequences.

In short, the value here contended for is a true value; it is not one invented to insure a greater depreciation deduction than Seaboard deserves. For that reason, the rationale of the indivisible asset doctrine prevents its application here. Seaboard falls within the two exceptions carefully carved out in *Thrifticheck* and *Boe;* it did not purchase assets of the proscribed class, and it individually evaluated the contracts.

CONCLUSION

Seaboard has shown in its brief that the Commissioner is here seeking to set aside findings of fact by the court below. These findings are amply supported by all the evidence introduced at trial, and cannot therefore be set aside as clearly erroneous. Furthermore, the authorities, both those cited by Seaboard and those cited by the Commissioner, lend support to the proposition that the disputed payments were a part of the purchase price of loan contracts and are amortizable just as are premiums paid in purchasing any type of interest-bearing security. For these reasons Seaboard respectfully requests that this court affirm the holding of the learned judge below.

Respectfully submitted,

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III SEABOARD'S CROSS APPEAL

Specification of Error

The Tax Court erred in failing to hold that 100 per cent of the amounts in dispute was attributable to the loan accounts and therefore could be amortized and deducted from Seaboard's income.

ARGUMENT

A. The Evidence Proves That Not 70 Per Cent, But 100 Per Cent Of The Amounts In Question Is Attributable To The Loan Contracts.

Seaboard does not here wish to argue that under the circumstances of this case this court may set aside the finding of the Tax Court that 70 per cent of the premium was an amortizable cost of acquiring loan contracts and 30 per cent was attributable to goodwill. Seaboard is convinced that, as it argues in part A of its argument in response to the Commissioner's brief above, the findings of the Tax Court are factual and sufficiently supported by the evidence that they may not be set aside as clearly erroneous. However, should this Court conclude that it may properly redetermine such findings, Seaboard submits that the evidence overwhelmingly demonstrates that not 70 per cent but 100 per cent of the premium was attributable to the loan contracts.

Seaboard does not wish to extend its brief unnecessarily by repeating here its discussions of the evidence appearing in the preceding sections. We will content ourselves with a brief review of these items:

(1) The loan contracts were worth a premium because:

(a) They carried relatively high rates of interest;

(b) Extensive information on the borrower's payment record and general financial background demonstrated the quality of the loans;

(c) A purchaser would be spared the expenses of overhead, advertising and credit check, which it would have to pay in writing new loans;

(d) The contracts carried with them the prospect of refinancing.

(2) Seaboard examined the loan contracts individually and determined their value.

(3) The loan contracts were worth a premium whether purchased singly or in conjunction with the assets of a loan office.

(4) The Commissioner introduced no evidence at trial which tended to prove that the loan contracts were worth less than Seaboard paid for them.

(5) Seaboard did not use the company name of the offices it acquired, it frequently moved the offices rather than staying at the former location, it obtained no employee contracts, it did not buy any licenses, and in general neither bargained for nor obtained any asset of the type usually associated with goodwill.

(6) The contracts had definitely ascertainable useful lives of three years and five years.

In the face of such evidence, the allocation of 30 per cent of premiums paid to goodwill must be considered arbitrary. There is nothing in the record to suggest that

Seaboard obtained any goodwill, or indeed that any seller possessed goodwill. In the absence of proof to the contrary or a convincing refutation of Seaboard's evidence by cross examination, the facts established by Seaboard must be deemed admitted. Seaboard did in fact pay a premium to purchase loan contracts. This premium is deductible in full when amortized over its useful life.

B. The Sellers Did Not Possess Goodwill, And Therefore No Part Of The Premium Could Be Attributable To Goodwill.

The evaluation of goodwill has been a continuing source of dispute between the Commissioner and taxpayers through the years. It is an asset hard to define, harder to value. In response to this evaluation difficulty the Internal Revenue Service has put forward a formula, ARM 34, 1920-1 C.B. 31, to be used in cases such as the present one.

The formula has been used as the basis for decision or has been urged on behalf of at least one party or the other in at least 58 cases. The Commissioner has consistently used the formula to prove the presence of goodwill in a purchased business when it suited his needs, extending to the very recent past. See *e.g., American Steel & Pump Corp.,* P-H Tax Ct. Mem. ¶ 62,024, 21 CCH Tax Ct. Mem. 109.

The history of the formula, traced in the many cases in which it has been cited, shows that it has been applied to businesses all across the commercial spectrum. It has been used in such industries as the manufacturing of door hinges, the selling of windows, the feed and seed business, and the operation of a newspaper.

The formula rests upon the thesis that the earnings of a business are the touchstone of goodwill. It assumes

that the earnings will show the effect of the other factors commonly associated with goodwill such as location, name, and personnel. That this earnings thesis is in accord with the present thinking of the Commissioner is shown by the following excerpt from a 1959 Revenue Ruling:

> In the final analysis, goodwill is based upon earning capacity. The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. Rev. Rul. 59-60, 1959-1 C.B. 237, 241.

The formula establishes the "fair return on . . . net tangible assets" at 8, 9 or 10 per cent. If the formula is applied in the manner set out in ARM 34, it will show no goodwill in any business that returns less than 8 per cent; it will show some goodwill in every business that returns more than 10 per cent. The formula contemplates capitalizing the amount by which the return exceeds 8, 9, or 10 per cent. It specifies the use of the average earnings for the five years immediately preceding the valuation date to arrive at the average return.

Seaboard is able to apply the formula only to National Finance Corporation, Monmouth Loan Corporation, and to the nine subsidiary corporations whose stock was purchased from American National Finance Co. In no other cases does Seaboard have access to corporate records or tax returns of the sellers.

Seaboard believes that the application of the formula to the earnings of the eleven corporations above described produces a result which is representative of all the purchases under consideration. More than one-half of the aggregate premium here in question was paid to acquire the loan contracts of these eleven corporations; the

subsidiaries of American National Finance Co. alone account for approximately one-half of the entire premium. American National Finance Co. operated in states, notably New Jersey, in which the small loan business was relatively most profitable. (II-R 114, *et seq*) Moreover, Seaboard paid as high a premium for the loan contracts purchased from American National Finance Co. as it did in any of the purchases here involved. (I-R 19, Exh. 1-A) It is reasonable to assume that American National Finance Co. would have a higher return than average on its net tangible assets.

Indeed it is likely, though Seaboard cannot prove it, that the earnings of the other sellers prior to Seaboard's acquisitions were lower in relation to net tangible assets than those of the American National Finance Co. subsidiaries.

Seaboard's ARM 34 computation is set forth in Appendix "A". The figures which form the basis of this computation are from the tax returns in evidence as Exhibits 63 through 73.

The average return on net tangible assets for all of the corporations to which Seaboard was able to apply the formula was 5.46 per cent. This percentage is a full two and one-half percentage points less than the minimum 8 per cent return which ARM 34 prescribes. It is little more than half the return of 10 per cent which the courts have frequently chosen as a fair return. See *e.g., General Outdoor Advertising v. Comm'r,* 149 F. Supp. 163 (Ct. Cl. 1957), cert. den. 355 U. S. 891 (1957). It exceeds by only a small margin the return on Savings and Loan Association savings accounts. The formula tells us, therefore, that the eleven corporations to which it can be applied had no goodwill at the time of the purchase by Seaboard.

Seaboard is aware of the substantial shortcomings in the application of any formula to a problem as factual as the present one. It realizes, too, that the courts have frequently turned away from a formula approach when better evidence was available to support a decision. Here Seaboard has presented substantial evidence to support its arguments; it offers the formula only as an additional and corroborating factor to substantiate its principal argument.

Despite the limitations inherent in the use of a formula Seaboard believes that ARM 34 has significant value in the present situation. In the consumer finance industry the "assets" of a business are its loan contracts. The return upon these assets is dependent upon the relation between the cost of money borrowed and the return on money loaned. There are no factors such as accelerated depreciation or destruction of physical assets to distort the earnings of a consumer finance company. The return on investment is a more accurate measure of goodwill in the consumer finance industry than it is in many of the other industries to which the courts have applied the formula.

The formula has additional significance here in that this is not a borderline case. The average return in the present situation is not marginal; it falls far short of the minimum 8 per cent specified in ARM 34. The figures are not ambiguous; they emphatically negate the presence of goodwill.

If, therefore, the selling corporations had no goodwill, it is logically impossible that Seaboard purchased any such asset from them. The formula, so often and so effectively used by the Commissioner, speaks out clearly in Seaboard's favor and furnishes strong support for the

conclusion that Seaboard paid the disputed amounts to purchase small loan contracts, not goodwill.

CONCLUSION

Seaboard properly amortized the entire premium paid on purchased loan accounts, and the holding of the learned trial court must be reversed and remanded with instructions to enter judgment that 100 per cent of the loan contract premiums is deductible as exhaustion of a wasting asset under Section 167 of the Internal Revenue Code.

Respectfully submitted,

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APPENDIX "A"

GOODWILL CALCULATED BY ARM 34 FORMULA
WITH ADVANCES FROM PARENT TREATED AS EQUITY

Company Purchased	Average Tangible Net Assets	Average Net Earnings	Return on Tangible Net Assets
Industrial Loan Society, Inc. (New Jersey)	$1,501,058.84	$ 93,799.88	6.25%
National Small Loan Society, Inc. (Virginia)	366,578.36	24,819.04	6.77%
American Loan Society, Inc. (Massachusetts)	419,164.69	21,333.42	5.09%
Mutual Loan Company (New Jersey)	638,470.60	30,576.58	4.79%
Equitable Industrial Loan Society, Inc. (Connecticut)	764,361.39	39,440.79	5.16%
Industrial Loan Society, Inc. (Maryland)	167,236.19	16,407.90	9.81%
National Equitable Loan Society, Inc. (Delaware) (Pennsylvania)	331,849.69	20,483.41	6.17%
Industrial Loan Society, Inc. (Delaware) (Pennsylvania)	1,024,681.84	61,073.46	5.96%
TOTAL Purchased from American National Finance Corporation	5,213,401.60	307,934.48	5.90%
Monmouth Loan Corporation	97,822.63	(1,141.40)	(1.17%)
National Finance Corporation	1,227,382.72	50,353.10	4.10%
TOTAL of All Corporations Purchased	$6,538,606.95	$357,146.18	5.46%

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

AUSTIN H. PECK, JR.

Nos. 20,159-20,174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

SEABOARD FINANCE COMPANY,
SEABOARD FINANCE COMPANY, TRANSFEREE,
SEABOARD FINANCE COMPANY OF LYNWOOD,
SEABOARD FINANCE COMPANY OF MONTEREY,
SEABOARD FINANCE COMPANY OF NORTHERN CALIFORNIA,
SEABOARD FINANCE COMPANY OF COLORADO SPRINGS,
SEABOARD FINANCE COMPANY OF DENVER, TWO,
SEABOARD FINANCE COMPANY OF DENVER, THREE,
SEABOARD FINANCE COMPANY OF DENVER, FOUR,
SEABOARD FINANCE COMPANY OF DENVER, FIVE,
SEABOARD FINANCE COMPANY OF PUEBLO, TWO,
SEABOARD FINANCE COMPANY OF CONNECTICUT, INC.,
SEABOARD FINANCE COMPANY (IDAHO),
SEABOARD FINANCE COMPANY OF TERRE HAUTE, INC.,
SEABOARD FINANCE COMPANY, INC. (MASSACHUSETTS),
SEABOARD FINANCE COMPANY OF FLINT,

Respondents

SEABOARD FINANCE COMPANY, ET AL.,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

FILED
OCT 11 1965
FRANK H. SCHMID, CLERK

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE COMMISSIONER

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TAX COURT OF THE UNITED STATES

BRIEF FOR THE COMMISSIONER

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 41-112)[1/] are not officially reported.

1/ The record in this case consists of two volumes, designated Volume I and Volume II. References to Volume I will be cited as "I-R." and references to Volume II will be cited as "II-R.".

JURISDICTION

These consolidated petitions for review (I-R. 129-131) and cross petitions for review (I-R. 132-134) involve federal income taxes for fiscal years ending in 1955, 1956, 1957, and 1958.[2/] By his notices mailed to the taxpayers on March 2, 1962 (I-R. 1) the Commissioner determined deficiencies in the aggregate amount of some $621,000 (I-R. 42-43). Within ninety days thereafter and on May 24, 1962, the taxpayers filed petitions for redetermination with the Tax Court, pursuant to Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-5.) The decisions of the Tax Court, redetermining the deficiencies at about $202,000, were entered on December 16, 1964. (I-R. 113-128.) The case is brought to this Court by petitions for review filed by the Commissioner on March 10, 1965 (I-R. 129-131), and by cross petitions for review filed by the taxpayers on April 16, 1965 (I-R. 132-134), all within the time prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of the 1954 Code.

2/ The taxpayers in this case are related corporations. The proceedings were consolidated in the Tax Court (I-R. 41) and are consolidated here (I-R. 143-145). Pursuant to a stipulation of the parties, approved by the Court (I-R. 143-145), the pleadings in Tax Court No. 1756-62 (Court of Appeals No. 20159) are the only pleadings reproduced in the record on appeal and are to be considered representative of the pleadings in the other fifteen proceedings. The term "pleadings" refers to the petition, answer, amended answer, reply to amended answer, petition for review and cross petition for review filed by the parties in each proceeding.

QUESTION PRESENTED

Taxpayers in this case, the Seaboard Finance Company and fourteen of its wholly-owned subsidiaries, are engaged in the small loan business throughout the United States, and during the tax years in issue, they purchased 55 small loan businesses. In each purchase, the outstanding loan accounts were the principal assets acquired and in each purchase the taxpayers paid an amount in excess of the face or book value of the loan accounts.

The question presented is whether the Tax Court erred in holding that 70 percent of the excess purchase price or premium was attributable to the loan accounts (rather than to goodwill) and, as such, was depreciable over the average useful lives of the loan accounts.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 167. DEPRECIATION.
>
> (a) General Rule.--There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)--
>
> (1) of property used in the trade or business, or
>
> (2) of property held for the production of income.
>
> * * *

(26 U.S.C. 1958 ed., Sec. 167.)

Treasury Regulations on Income Tax (1954 Code):

> Sec. 1.167(a)-3 Intangibles.
>
> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset

may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. For rules with respect to organizational expenditures, see section 248 and the regulations thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder.

(26 C.F.R., Sec. 1.167(a)-3.)

STATEMENT

Taxpayers in this case are engaged in the business of making small loans throughout the United States, and during the years 1957 and 1958, they underwent a period of rapid growth and expansion. As part of the expansion program, taxpayers purchased 55 small loan businesses and in each purchase, paid an amount in excess of the face or book value of the loans outstanding and the fixed assets acquired, if any. Taxpayers treated the excess purchase price (hereinafter sometimes referred to as the "premium") as part of the cost of the loan accounts and sought to depreciate the premium over the average useful lives of the loan accounts, namely, three years for secured loans and five years for unsecured loans. The Commissioner disallowed the depreciation deductions and proposed deficiencies on the ground that the premium was paid for goodwill, which is not depreciable. The Tax Court found that of the total premium paid, 30 percent was attributable to goodwill, and 70 percent was attributable to the loan accounts. It then held that the premiums allocable to the contracts could be depreciated over the three and five-year periods. The court rejected the

Commissioner's alternative argument that the premium was paid for an existing customer structure with an indeterminate useful life. This appeal followed.

The small loan business is subject to strict controls by the various states because the rate of interest charged by a small loan company is higher than the general usury laws of a state. During the years in issue, the maximum rate of interest that could be charged in California was 2 1/2 percent per month on the first $100, 2 percent on the next $400, and 5/6 of 1 percent on any portion of the balance exceeding $500. This interest amounts to 30 percent annually on the first $100, but the maximum rate varies in the different states. (I-R. 47.)

A small loan company must obtain a license from the state in order to operate an office. Some states issue licenses based upon a test of convenience and necessity which is a determination that the issuance of a license would be to the convenience and advantage of the public. Taxpayers would not buy an office if they could not acquire the seller's small loan license by transfer. (I-R. 47.)

There is competition among various large small loan companies in acquiring smaller loan companies (I-R. 51), and the taxpayers advertise extensively to attract customers. Direct mail advertising is sent to customers and direct mail solicitation is sent to former customers. (I-R. 48.) When a loan is paid down, taxpayers contact their customers with an offer of an "all-in-one" package loan which, in effect, suggests to the customer that he put all of his debts

into one total and borrow the money from the taxpayers to pay off the numerous obligations. (I-R. 49-50.)

A small loan company's new business comes from various sources, but the main source is from present customers. In the taxable year ended September 30, 1957, taxpayers made 553,400 loans, of which 334,051, or approximately 60 percent, were to present customers who refinanced their accounts. In the taxable year ended September 30, 1958, taxpayers made 684,221 loans, of which 414,301 (60 percent) were to present customers by refinancing of existing balances. When an account of a present customer is refinanced, additional money is advanced in 99 percent of the cases, and a customer will generally refinance his loan two or three times before finally paying it off. Of the remaining new business (i.e., 40 percent), approximately 25 percent comes from former borrowers who have previously paid off their loans. (I-R. 49.)

A new small loan office which is started from "scratch", will generally have to operate for about 2 1/2 years before it begins to make a profit. The new office will lose money for a period of time after it begins business and will not reach a break-even point until it has been operating for approximately 18 months. (I-R. 50.) It then takes an additional year or longer before it starts making a profit. The costs incurred by a new small loan office prior to the time it begins to break even in its operations are called start-up costs. When a small loan company that has been in operation for some time is purchased, the buyer avoids the necessity of operating for a period of 18 months or longer

at a loss and avoids incurring the start-up costs necessary to put a new small loan office on a paying basis. (I-R. 51.)

During the taxable years in issue, taxpayers purchased 55 small loan businesses and in each purchase they paid an amount in excess of the face or book value of the loan contracts. (I-R. 50-51.)[3/] The value placed on the loan contracts was determined by "spreading" the accounts. (I-R. 52.) The spreading was performed by employees of Seaboard and consisted of listing in columns the number of each loan contract, the name of the borrower, the principal balance due, and a rating or classification of the individual contract. The classification symbols were A+, A, B, C, D and E. (I-R. 52; Ex. 17-Q.)

In classifying the individual contract the person making the spread examined the contract itself and the file relating thereto to determine the qualifications of the borrower. Each contract was then classified as A+, or A, or B, etc., and a total of the balances in each classification was computed. The person spreading the accounts then added to the aggregate balance of the A+ accounts a percentage of the total balance which, in the purchases here involved, ranged generally between 15 and 30 percent. (I-R. 52-53.) No percentage or premium was added to the aggregate principal balance of loan contracts classified as A. The aggregate principal balances of loan contracts in the other classifications (B, C, D, E) were discounted by percentages varying from 25 to 75 percent. (I-R. 54, 56, 64.)

3/ Furniture and fixtures were purchased at book value. (I-R. 51.)

In determining the aggregate value of the loan contracts to be purchased the person making the spread added to the aggregate principal balances owing on all loan contracts the premium on the A+ contracts, and subtracted the discount, if any, on the other contracts. The resulting figure was the amount which was offered for the loan contracts in bargaining with the seller for the loan business. (I-R. 53-54.) In each purchase, taxpayers paid a net premium for the loan contracts. (I-R. 55.) The net premium was entered on the books in a separate account entitled "Premium Paid on Purchased Accounts" (II-R. 213), and depreciated over three and five year periods (I-R. 56-57). The propriety of this depreciation deduction is the basis of the Commissioner's petition for review to this Court.

SPECIFICATION OF ERRORS RELIED UPON

1. The Tax Court erred in failing to hold that the entire premium was attributable to goodwill.

2. The Tax Court erred in holding that 70 percent of the premium was attributable to the loan accounts.

3. In the alternative, the Tax Court erred in failing to hold that in each purchase the premium was paid for the customer structure of a going business which is an indivisible mass asset with an indeterminate useful life.

SUMMARY OF ARGUMENT

The Tax Court's decision, that the taxpayers paid 70 percent of the net premiums for the loan contracts because some of the contracts were worth more than their face value, fails to probe the essential inquiry in this case; namely, why were some contracts worth more than face value while others involved in the same purchase were worth only face value, or less? The answer to that question is fairly obvious. The taxpayers were willing to pay a premium for some of the loan contracts because, on the basis of the taxpayers' analysis of the accounts, those were the loans that were most likely to be renewed or refinanced. On the other hand, loans which would run off the books at the end of the term remaining when purchased were worth only face value to the taxpayers, and those loans which would require collection efforts were discounted.

The taxpayers' prognosis, that the premium accounts would be refinanced, proved to be quite accurate. During the years in question, approximately 60 percent of the taxpayers' business came from present customers who refinanced their accounts, while another 10 percent came from former customers who had previously paid off their loans. Each time an account is refinanced, additional money is advanced to the borrower and the taxpayers earn interest on the new money. To illustrate the importance of refinancing, the taxpayers introduced into evidence two specific loan accounts which were characterized as "typical" accounts for which premiums had been paid. One account, with a principal balance of $190.07 when purchased, was subsequently

refinanced three times and the taxpayers earned $366.16 in interest alone from that account. The second account, with a balance of $303.43 when purchased, was subsequently refinanced five times and returned $403.80 in interest alone to the taxpayers. It was the probability of repeat business, therefore (with its additional income-producing potential) that made some accounts worth more to the taxpayers than other accounts and it was the probability of repeat business that constituted the primary reason why the taxpayers paid the premiums in question. However, as this Court has recognized the expectancy of continued patronage is "the essence of good will" and amounts paid for goodwill are not depreciable.

In addition to the likelihood of repeat business, the premiums were also paid, at least in part, for the benefits of continuity enjoyed by the purchaser of a going business. The main benefit, of course, is the power to earn income over the period immediately after the business is taken over, and this power--insuring as it does against a break in earnings which may be difficult, if not impossible, to reestablish--has a value quite independent of any profit that may be derived from the particular accounts purchased. Moreover, the purchaser of an existing small loan business avoids incurring the start-up costs of a new business and the necessity of operating at a loss for 18 months or more. Finally, the existing customer structure acquired by the purchaser of a going business may, as in the instant case, be solicited for allied services and, as such, constitute yet another source of income. The amount paid for the customer structure of a going business is treated as an investment

in a single indivisible asset with an indeterminate useful life because while the value of a customer structure may fluctuate from time to time as contracts expire or customers go elsewhere and are replaced by new ones, this is regarded not as a process of exhaustion but rather as a process by which a continually existing asset is kept intact.

In short, the taxpayers paid a premium in acquiring the small loan businesses primarily because of the good prospects of repeat business from the existing customers. In addition, the premium may also be viewed as being paid, at least in part, for the benefits of continuity, the avoidance of start-up costs, and for an existing customer structure. All of these factors are elements of goodwill and the Tax Court erred in failing to hold that the entire net premium was attributable to goodwill.

ARGUMENT

THE NET PREMIUM PAID BY THE TAXPAYERS IN ACQUIRING NUMEROUS SMALL LOAN BUSINESSES WAS PAID FOR GOODWILL WHICH IS NOT DEPRECIABLE

The Tax Court erred in allocating 70 percent of the premiums to the loan contracts because it asked itself the wrong question. The court was of the opinion that (I-R. 102), "The crux of these cases is for what did petitioners pay the premiums here in issue." Having asked itself that question, the court then concluded that what the taxpayers paid most of the premium for was the loan contracts. But the court's conclusion begs the question, because it is impossible to ascertain for what the premium was paid unless we know the reason why the premium was paid. In other words, why was one loan account

more valuable to the taxpayers than another loan account? Or to put it another way, why would taxpayers pay $125 for one loan account with a $100 face value while paying only face value or less for another $100 account? The reason why, as we will show, is because the taxpayers expected to realize more than $125 on the premium accounts, and the reason why they expected to make more money on those accounts was because those borrowers would continue to do business with the taxpayers beyond the remaining term of the existing loans; whereas the loans for which only the face value was paid would run off the books at the expiration of their original terms. The likelihood of continued patronage, for which the taxpayers paid a premium, is clearly goodwill and this Court has so stated: "To us, the essence of good will is the expectance of continued patronage, for whatever reason." Boe v. Commissioner, 307 F. 2d 339, 343. 4/ It is the Commissioner's contention that the high quality of existing loans for which the taxpayers paid a premium was attributable primarily to the good prospects that those loans would be refinanced and that additional money would be advanced from which the taxpayers would realize additional income.

4/ The Fifth and Seventh Circuits define goodwill simply as the probability or expectation that "the old customers will resort to the old place." See Commissioner v. Killian, 314 F. 2d 852 (C.A. 5th); Karan v. Commissioner, 319 F. 2d 303 (C.A. 7th).

A. The high quality of the existing loans, for which the taxpayers paid a premium, was attributable primarily to the good prospects of their renewal

Before discussing the uncontradicted evidence, which clearly shows that the premiums were primarily paid for the probability of repeat business, it will be helpful to discuss the Fourth Circuit's decision in United Finance and Thrift Corp. of Tulsa v. Commissioner, 282 F. 2d 919. In that case, the taxpayers purchased two small loan companies and in each of the purchase contracts a separate consideration was allocated to a covenant not to compete. The Tax Court found that part of the premium was paid for the covenants and part for goodwill, and, as to the latter, made the following relevant comment (United Finance & Thrift Corp. of Tulsa v. Commissioner, 31 T.C. 278, 286):

> The significant factor in connection with goodwill is the petitioners' own testimony to the effect that the paper they bought would be turned over on the average 2 1/2 times and would remain on the books of the purchaser for an average period of 30 months. Petitioners' records show that on the basis of experience this prognosis is quite accurate. We think this clearly represents goodwill or going concern value, and is an intangible asset of substantial worth.

The taxpayers petitioned for review of the Tax Court's decision and the Commissioner did not cross-petition. In affirming the Tax Court's holding that part of the premium designated as payment for a covenant was in fact paid for goodwill, the Fourth Circuit summarized some of the facts as follows (p. 922):

> In the Tax Court, the taxpayers admitted that it was their experience in the small loan business that borrowers do not meet their obligations on

> time; that this results in the necessity for "refinancing" by extending another loan over a longer period of time, and that, on the average, a borrower remains on their books with respect to the original amount borrowed for a period of two and one-half years. Taxpayers further admitted that this "refinancing" is profitable, and that its prospect was one of the main reasons why they were willing to pay more than the face amount of the book obligations in order to acquire another loan company's current accounts. * * *

The court then made the following relevant comment (p. 922):

> With a small loan company, its borrowers are its customers. If its business is to continue, relationships and dealings with those customers are essential. Its stock in trade is the sum total of the choses in action which it holds, representing the obligations of its customers to it. When more than the face amount of those choses in action is paid by a purchaser, who expects to continue the small loan business through dealings with those customers, evidence of good-will value can be looked for. That evidence was found here.

The Tax Court's attempt to distinguish United Finance on the grounds that, here, the taxpayers produced evidence to support their contention that "the loan contracts were worth a premium" (I-R. 107), still ignores the essential question of why the loans were worth a premium. The loans were worth a premium in United Finance because of the likelihood of repeat business through refinancing, and that is precisely the situation here.

Thus, like the court in United Finance, the Tax Court in the instant case found that taxpayers' customers will refinance their loans two or three times before finally paying them off, and each time a loan is refinanced, additional money is advanced to the borrower from which the taxpayers earn additional interest. (I-R. 49.)

The importance of refinancing was illustrated by Weidman, Seaboard's president, by discussing two "typical" accounts for which premiums had been paid. (II-R. 141-149.) In one account, the original balance outstanding when purchased was $190.07. Subsequently, the account was refinanced three times for the following amounts: $133.63, $175.63 and $208.42. The account remained on the books for 54 months and taxpayers realized $366.16 in interest alone from that account. (See Ex. 85.) The balance in the second account when purchased was $303.43. The account was subsequently refinanced five times, and remained on the books for 55 months. The interest realized by the taxpayers from that account totalled $403.80. (See Ex. 86.) Viewed in this light, the reason is perfectly obvious why the taxpayers were willing to pay a premium for some accounts, and there is no reason to doubt Weidman's testimony that the possibility of repeat business through refinancing was "very definitely" taken into account in valuing the accounts. (II-R. 140.)

Moreover, like the taxpayers in United Finance, the taxpayers' prognosis in the instant case, that the purchased accounts would be the source of repeat business, also proved to be quite accurate, because during the years in question refinancing accounted for 60 percent of their business. Thus, the Tax Court found (I-R. 49) that in the taxable year ended September 30, 1957, taxpayers made 553,400 loans of which, 334,051 were "from present customers and were refinancing of existing accounts," and in the taxable year ended September 30, 1958, they made 684,221 loans of which 414,301 were to present customers.

In 99 percent of those cases where the loans were refinanced, additional funds were advanced to the customers.

The testimony of Lide, an employee of Seaboard who supervised the spreading in some of the purchases, also shows that the possibility of renewal was the prime consideration in valuing the accounts. Thus, in describing the method used in spreading the accounts, Lide testified that an account was classified as "A" (for which only the face amount was paid) "if we think that we will collect the balance on the account, but with little possibility of renewal." (II-R. 229-230.) And finally, in explaining the factors taken into consideration in valuing an account, Weidman testified as follows (II-R. 89):

> The factors that would dictate that we would pay less than face would involve those accounts that we would not renew, based on sound credit judgment and which, of course, would run off of the books, according to original terms. (Emphasis added.)

In short, the uncontradicted evidence in this case clearly demonstrates that the taxpayers paid a premium on the A+ accounts because those were the accounts that would be refinanced and remain on the books for a longer period than the term remaining when purchased. That is the only rational reason why a premium was paid and there is nothing in the Tax Court's opinion which suggests a different reason. Thus, the court's conclusion that the premium accounts were simply worth more is only half an answer. It is only when the reason for their value is ascertained that it becomes clear that premium value was attributable primarily to the good prospects of their renewal, which is goodwill, and which, as such, is not depreciable. Treasury Regulations on Income Tax (1954 Code), Section 1.167(a)-3, supra.

In holding that only 30 percent of the premium was paid for goodwill, the Tax Court was apparently over-impressed by the fact that the taxpayers did not use the seller's name or continue to employ the seller's personnel. But this is too narrow a view of goodwill. The important consideration is whether the taxpayers expected the customers to refinance and the evidence shows that 60 percent of the customers did refinance. The small loan business is highly competitive and, as Weidman testified, other sources of credit--such as competitors, banks, credit unions and finance companies--were available to the taxpayers' customers. (II-R. 128-129.) The customers chose, instead, to continue doing business with the taxpayers. The reason why customers refinanced is not important; the fact that they did, is important. United Finance and Thrift Corp. of Tulsa v. Commissioner, supra; Boe v. Commissioner, supra.[5/]

5/ The Tax Court's reliance (I-R. 107) on North American Loan & Thrift Co. No. 2 v. Commissioner, 39 T.C. 318, affirmed, 319 F. 2d 132 (C.A. 4th), is misplaced because the Tax Court in that case never passed on the issue here in question. In that case, the taxpayer purchased a small loan company and sought to depreciate the premium paid over a 14-month period. However, since the 14-month period had elapsed prior to the taxable year before the court, Judge Raum disposed of the issue as follows (39 T.C., p. 326):

> Thus, assuming that petitioner was entitled to amortize the total premium paid therefor, petitioner admits it should have done so over their known life of 14 months. * * * [which] had fully expired prior to 1952, the taxable year in issue. (Emphasis added.)

Contrary to the Tax Court's observation in the instant case, therefore, (I-R. 107) the court in North American Loan did not conclude that the premium was amortizable, but rather, for the purpose of disposing of a moot issue, it simply assumed that the premium was amortizable.

Although the premium was paid primarily for the expectancy of repeat business, it is also reasonable to view the premium as being paid, at least in part, for the benefit of continuity enjoyed by the purchaser of a going business. We will discuss this aspect of the case next.

B. The premium was also paid, in part, for the benefit of continuity enjoyed by the purchaser of a going business

If we limit our consideration to a single loan contract, there appear to be two inducements (other than the probability of refinancing) which will lead to its purchase: (1) the contract may have been made at a higher rate of interest than the permissible rate at the time of purchase, or (2) if it was not, it may cost the buyer something in time and money to secure an equivalent contract. The first inducement did not exist in the instant case because it can be fairly inferred that the rate of interest charged on the loans when originally made was the maximum permissible under state law (II-R. 40), and there is no indication that the legal rate at the time of purchase was different from the legal rate when the loan was made. Thus, there would be no inducement for the taxpayers to pay, say, $115 in order to collect $130, if they could collect $130 by loaning $100 themselves. However, as to the second inducement, Weidman testified that the cost of getting the first loan in a new office is "astronomical" (II-R. 209), and the Tax Court found (I-R. 50-51) that a new office which begins from "scratch" usually operates for a period of 18 months before it breaks even and for another year beyond that before it begins making a profit. However, a buyer of a small loan business

that has been operating for some time avoids the necessity of operating at a loss for 18 months or longer and also avoids the start-up costs necessary to put a small loan office on a paying basis. (I-R. 51.) Thus, the benefit of continuity enjoyed by the purchaser of a going business has a value quite apart from any profit that may be earned from the particular contracts purchased. This proposition was articulated by Judge Hand in United States Industrial Alcohol Co. v. Helvering, 137 F. 2d 511, 513-514 (C.A. 2d):

> In such an industry--for that matter, in any industry--continuity of sales is a condition of continued existence; once they stop, it is extremely hard, if not impossible, to start up the business again. Therefore the power to sell over the period immediately after the business is taken over, insuring as it does against such a break, has a value quite independent of any profit that may be got from those particular sales. There is no reason to suppose in the case at bar that the taxpayer would have paid anything whatever for the contracts if they had not contributed in this way to the continued existence of the business. * * *

In addition to the benefit of continuity and the avoidance of start-up costs, the taxpayers also acquired a customer structure which could be solicited for allied services. For example, customers acquired by taxpayers were sold or solicited for credit life insurance (I-R. 45-46; II-R. 176) and for the taxpayers' "ever-ready chek" program (I-R. 105). Taxpayers also contacted their customers with the offer of an "all-in-one" package loan (I-R. 49-50) and letters were sent to newly acquired customers encouraging them to drop into one of the taxpayers' offices and borrow more money (II-R. 104-106, 176, see Exs. 81, 82, and 83). Finally, over 10 percent of the taxpayers'

new business during the years in issue came from former customers who had previously paid off their loans. (I-R. 49; II-R. 176.)

In sum, the premium paid by the taxpayers in acquiring the various loan businesses is attributable to the good prospects of repeat business, the benefits of continuity, the avoidance of start-up costs and a customer structure to solicit for allied services. All of these factors are elements of goodwill and the Tax Court erred in failing to hold that the entire amount of the net premiums was attributable to goodwill.

C. The premium paid by the taxpayers may also be viewed as the cost of acquiring the sales or customer structure of a going business which is a single indivisible asset with an indeterminate useful life

In being able to step into the seller's shoes, the buyer of a going business enjoys an advantage he would not ordinarily enjoy if he were to start the business from scratch. This advantage is the existence of a sales or customer structure which enables the buyer to realize income as soon as the business is taken over. United States Industrial Alcohol Co. v. Helvering, supra, pp. 513-514. Because a customer structure is such an essential part of any business, a buyer will ordinarily be willing to pay something for it, and when he does, the amount is treated as payment for a single indivisible asset with an indeterminate useful life. See Thrifticheck Service Corp. v. Commissioner, 287 F. 2d 1 (C.A. 2d) (service and supply contracts); United States Industrial Alcohol Co. v. Helvering, supra (supply contracts); Westinghouse Broadcasting Co. v. Commissioner, 36 T.C. 912, 923, affirmed on another issue, 309 F. 2d 279 (C.A. 3d)

(advertising contracts); Anchor Cleaning Service, Inc. v. Commissioner, 22 T.C. 1029 (janitorial service accounts); Boe v. Commissioner, supra (medical service contracts); Danco Products, Inc. v. Commissioner, decided March 14, 1962 (P-H Memo T.C., par. 62,052) (janitorial service contracts); Scalish v. Commissioner, decided March 6, 1962 (P-H Memo T.C., par. 62,046) (location leases for cigarette machines); LaRue v. Commissioner, 37 T.C. 39 (dental practice); Commissioner v. Killian, supra (insurance business); Masquelette's Estate v. Commissioner, 239 F. 2d 322 (C.A. 5th) (accounting business); National Weeklies v. Commissioner, 137 F. 2d 39 (C.A. 8th) (magazine subscription list).

The customer structure is treated as an asset with an indeterminate useful life (and hence, not depreciable) because while its value may fluctuate from time to time as contracts expire and customers go elsewhere and are replaced by new ones, this is regarded not as a process of exhaustion, but rather as a process by which a continually existing asset is kept intact. See, e.g., Scalish v. Commissioner, supra. The taxpayers' own experience illustrates this principle. See Exhibit 77-KKK which shows that the customer structures purchased by the taxpayers have remained substantially unchanged from the date of their purchase through September 30, 1959.

The Tax Court's attempt (I-R. 109-111) to distinguish some of the above-cited cases on the ground that the taxpayers in the instant case made an effort to value the contracts individually is without merit. First, because this did not make each contract a separate asset but

was "merely a formula for determining the total purchase price to be paid." Anchor Cleaning Service, Inc. v. Commissioner, supra, p. 1035. Secondly, the fact that the taxpayers chose to amortize the premium over three or five-year periods instead of pro-rata for each contract, indicates that the taxpayers considered the contracts to be a single asset (Scalish v. Commissioner, supra) and, in fact, Weidman testified that it was not possible to allocate the premium among the individual loan contracts. (II-R. 201.) Finally, the gross premium arrived at by multiplying the sum total of the A+ accounts by a fixed percentage was reduced by the total discounts on the B, C, D and E categories, and the resulting net premium was, as the Tax Court noted, only "one factor used in determining the amount to be offered to the seller" in negotiating for a purchase price. (I-R. 54.) In other words, the premium finally arrived at in each purchase was a negotiated lump sum, and it was not and it could not be broken down on the basis of individual contracts.

Equally without merit is the court's attempt to distinguish the indivisible asset rule on the grounds that the rule does not apply to "binding agreements to pay money or render other valuable services," but does apply "to a class of asset like customer lists and to contracts which in practical effect are like customer lists". (I-R. 110.) The distinction is without substance, and, in any event, is inapplicable here. What the taxpayers acquired here was not an unrelated batch of individual contracts, but the customer structures of going-businesses. The Fourth Circuit aptly pointed out that "With a small loan company, its borrowers are its customers" * * * and "If its business is to

continue, relationships and dealings with those customers are essential". (United Finance, supra, p. 922.) There is no meaningful distinction between subscription lists, advertising contracts, supply contracts, service contracts, location leases, etc., and loan contracts. In each case, the asset purchased constituted all or a portion of the sales or customer structure of a business enterprise. That, in substance, is precisely what was purchased here, and the lower court erred in failing to recognize it.

CONCLUSION

For the foregoing reasons, the Tax Court's decision, that 70 percent of the premiums was attributable to the loan contracts and depreciable, is erroneous and should be reversed.

Respectfully submitted,

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OCTOBER, 1965.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1965.

RALPH A. MUOIO
Attorney

APPENDIX

EXHIBITS

Listed below are the exhibits offered and received as evidence in the Tax Court.

VOLUME II

EXHIBIT NO.	OFFERED	RECEIVED
1 thru 77 (Attached to Stipulation)	36	36
78	61	65
79	86	88
80	101	104
81, 82, 83	105	106
84	125	128
85	141	147
86	141	147
87	200	225
88	235	238

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

SEABOARD FINANCE COMPANY,
SEABOARD FINANCE COMPANY, TRANSFEREE,
SEABOARD FINANCE COMPANY OF LYNWOOD,
SEABOARD FINANCE COMPANY OF MONTEREY,
SEABOARD FINANCE COMPANY OF NORTHERN CALIFORNIA,
SEABOARD FINANCE COMPANY OF COLORADO SPRINGS,
SEABOARD FINANCE COMPANY OF DENVER, TWO,
SEABOARD FINANCE COMPANY OF DENVER, THREE,
SEABOARD FINANCE COMPANY OF DENVER, FOUR,
SEABOARD FINANCE COMPANY OF DENVER, FIVE,
SEABOARD FINANCE COMPANY OF PUEBLO, TWO,
SEABOARD FINANCE COMPANY OF CONNECTICUT, INC.,
SEABOARD FINANCE COMPANY (IDAHO),
SEABOARD FINANCE COMPANY OF TERRE HAUTE, INC.,
SEABOARD FINANCE COMPANY, INC. (MASSACHUSETTS),
SEABOARD FINANCE COMPANY OF FLINT,
Respondents

SEABOARD FINANCE COMPANY, ET AL.,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF FOR THE COMMISSIONER AS PETITIONER AND BRIEF FOR THE COMMISSIONER AS RESPONDENT

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FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20,159-20,174

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

SEABOARD FINANCE COMPANY,
SEABOARD FINANCE COMPANY, TRANSFEREE,
SEABOARD FINANCE COMPANY OF LYNWOOD,
SEABOARD FINANCE COMPANY OF MONTEREY,
SEABOARD FINANCE COMPANY OF NORTHERN CALIFORNIA,
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SEABOARD FINANCE COMPANY OF DENVER, FOUR,
SEABOARD FINANCE COMPANY OF DENVER, FIVE,
SEABOARD FINANCE COMPANY OF PUEBLO, TWO,
SEABOARD FINANCE COMPANY OF CONNECTICUT, INC.,
SEABOARD FINANCE COMPANY (IDAHO),
SEABOARD FINANCE COMPANY OF TERRE HAUTE, INC.,
SEABOARD FINANCE COMPANY, INC. (MASSACHUSETTS),
SEABOARD FINANCE COMPANY OF FLINT,
Respondents

SEABOARD FINANCE COMPANY, ET AL.,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF FOR THE COMMISSIONER AS PETITIONER AND BRIEF FOR THE COMMISSIONER AS RESPONDENT 1/

1/ Pursuant to a stipulation (I-R. 143-145), Part I of this brief is the Commissioner's Reply to the Answering Brief of Taxpayers (Br. 14-47) and Part II of this brief is the Commissioner's Answering Brief to the arguments raised by taxpayers as cross-petitioners (Br. 48-54).

I

THE NET PREMIUM PAID BY TAXPAYERS IN ACQUIRING NUMEROUS SMALL LAON BUSINESSES WAS PAID FOR NON-AMORTIZABLE GOODWILL

In their brief (Br. 19), taxpayers have stated:

> Seaboard's position in this case can be summarized in a brief sentence -- Seaboard paid more than face value for the loan contracts because they were worth more than face value.

We agree. The contracts purchased in every transaction were worth more than their face value because each group of contracts was not only a group of unconditional promises to pay face value in money on a given date but was also a list of customers who were expected to enter into new contracts and thus provide a source of continued patronage. The evidence is undisputed that of the several value factors that underlay the payment of the premiums in question, the most significant was the prospect that the customers would refinance their contracts. The only question involved in this case is a legal one, namely, whether this Court was correct in holding that a payment for the "expectancy of continued patronage" is non-amortizable goodwill (Boe v. Commissioner, 307 F. 2d 339, 343), or whether the Tax Court was correct in permitting taxpayers to amortize the portion of the premium paid for "expectancy of continued patronage".

Taxpayers' reliance on the clearly erroneous rule (Br. 14-19) is simply an effort to obscure the real question involved. Neither the facts nor the inferences to be drawn from those facts

are in dispute. What is in dispute is the meaning of goodwill and the nature of goodwill as a non-amortizable asset. In Boe, supra, p. 342, this Court made it clear that when "the question is not, what are the facts, but what are the legal consequences of those facts", the issue is a legal one, not a factual one. 2/ Thus, the issue here is purely a legal one.

Taxpayers are in the business of lending money. As part of their program of expansion, taxpayers purchased the business (or in some cases, part of the business) of 55 small loan companies in various locations around the country. In each case, taxpayers examined the outstanding loan contracts of these companies and by a process referred to as spreading the accounts determined that they would pay the seller a premium above the face value of the assets. This is undisputed.

A loan contract is a borrower's promise to pay off a fixed sum of money at a given rate of interest by a fixed date. The various states regulate the maximum term (never more than 36 months) and maximum interest rate that could be provided in these contracts, but all states permit refinancing. Refinancing entails

2/ In Boe, this Court was required to determine whether the Commissioner's position as to the meaning of goodwill (which is identical to the Commissioner's position in this case) was a legal issue because it was first raised after the trial; the fact that in this case the Tax Court rejected this Court's interpretation of goodwill has not suddenly converted that same question into a factual one.

(II-R. 132) "having the customer come to the office and executing documents, cancelling out the old documents, and, of course, the transactions based on lending him an additional amount of money." In spreading the accounts to determine the size of the premium they would pay, the major factor taken into account was the prospect of the various borrowers' refinancing their loans, i.e., whether they would execute new loans. As taxpayers' witness, Lide, testified, the difference between the A and A+ accounts was his guess as to the prospect ot renewal or refinance. (II-R. 229-230.) 3/

3/ This testimony was as follows (II-R. 229-230):

> Q. Will you tell us in your own words what you do in spreading accounts.
>
> A. Well, I take a columnar pad and head the columns; account number, last name, the balance of the account, and then the grading symbols -- A plus, A, B, C, D, and E under that; then we take each account and list it according to account number and balance; then study the facts pertaining to the account -- whether it is on the account card or substantiating files -- and classify it A plus if we deem it a premium account; A if we think that we will collect the balance on the account, but with little possibility of renewal; B if it represents a 75 percent evaluation, and that account will probably cause trouble to some degree in our collection follow-up -- which would be expensive -- probably represent the 25 per cent or the 25 per cent may be charged off.
>
> Likewise, C would represent 50 per cent accounts where there is more collection activity involved and where the account will probably have to be chased by -- excuse the word chased, it is a common word in the industry -- followed up by a personal contact.
>
> Q. An effort to collect?
>
> A. An effort to collect and the D accounts would be those that we think have very little possibility of collecting anything out of, but if we do, it is possible about 25 per cent of the balance.
>
> E accounts are apparent loss accounts.

This, too, is undisputed.

Thus, it is clear that in evaluating two contracts requiring a payment of $100 by December 31, one might be rated as A (no premium) and one A+ (involving a premium) not because of the risk involved or because of anything contained in the contract, but because in one case (A+) the other party to the contract was expected to be a source of one or more future contracts and in the other case (A) the borrower was expected only to pay off the contract without entering a new one. Of course, none of the customers was obligated to refinance (nor could they be under state law), and on an individual contract basis taxpayers' evaluators could never be certain that a particular borrower would refinance. 4/ However, their experience in past cases (equally borne out by the facts here) was that 60 percent of the customers as a group would refinance. (I-R. 49, II-R. 133.)

In short, the undisputed and indisputable evidence makes it clear that there are several value factors associated with the purchase of a group of loan contracts. Each group of contracts has value in and of itself because the contracts are promises to

4/ Mr. Weidman made this clear (II-R. 205):

> Q. Do you have any way of telling which account or which particular borrower will renew his loan?
> A. We can't guarantee that a loan will be renewed.
> Q. You just can't tell which borrower will renew or not in any particular time, can you?
> A. No. We have to work on our experience.

pay a given amount of money at interest over a given period and each group of contracts also represents an active list of customers which experience shows can be expected to execute repeat contracts. Taxpayers' spreading of the accounts was a careful and experienced attempt to segregate these value factors (and risk factors), and the primary element underlying the payment of premiums was the taxpayers' expectation as to the significance of the low risk repeat business that each group of contracts purchased could be expected to generate. 5/ As taxpayers' brief points out (p. 32, heading D), "The prospect of refinancing is simply a valuable right accompanying a loan contract" (emphasis added); it is not part of the contract itself. The legal question in this case is whether this value factor is non-amortizable goodwill, as the Commissioner contends, or whether it is some form of wasting asset, as taxpayers contend.

The Commissioner submits that this legal issue has previously been considered by this Court and other courts in undistinguishable cases. See, e,g., Boe v. Commissioner, supra; United States Industrial Alcohol Co. v. Helvering, 137 F. 2d 511 (C.A. 2d);

5/ Other factors, such as the interest rate of the particular state involved and the existence of competing purchasers for a business (II-R. 89-92), were taken into account in determining the size of the premium percentage that would be paid for A+ accounts but these more general considerations are not a basis for differentiating between A and A+ accounts.

Thrifticheck Service Corp. v. Commissioner, 287 F. 2d 1 (C.A. 2d); and United Finance and Thrift Corp. of Tulsa v. Commissioner, 282 F. 2d 919 (C.A. 4th). However, before turning to a discussion of these cases, it seems appropriate to dispose of several minor points that have been raised by taxpayers.

First, it should be noted that, contrary to taxpayers' assertion (Br. 33), the Commissioner does not contend that the prospect of refinancing was the only value element underlying the premium payments. It was, however, the most significant value factor involved and the Tax Court's error in allowing the amortization of 70 percent of the premium was mainly attributable to its failure to realize that amounts paid for this element were non-amortizable.

We do recognize that taxpayers were also purchasing the ability to start as an established going concern in a new community and thereby save the considerable expense and difficulty attendant upon opening a new office without an established set of accounts. This going concern value, while different from goodwill, is nevertheless a non-amortizable value factor, as this Court has recently held in Cornish v. United States, 348 F. 2d 175.

On the other hand, taxpayers assert, without record citation, that (Br. 33) "because of the high interest rate and quality borrowers, such contracts would be worth a considerable premium even if the borrower did not refinance." This statement is directly contrary to the testimony of taxpayers' own witness, who stated that no pre-

mium would be paid for an account that offered "little possibility of renewal". (II-R. 229-230.) Indeed, throughout their brief, taxpayers have tried to create the impression that the high interest rate was one of the reasons for the payment of a premium. This is simply untrue. There is not one scintilla of evidence indicating that taxpayers were willing to accept an interest rate less than the maximum allowable under state law or that they ever loaned money at less than the maximum rate of interest.

Taxpayers are seeking to assimilate the testimony indicating that the maximum interest rate of a state was taken into account in determining the amount of premium as evidence bearing on the reason for the premium payments. This does not follow, for while it is clear that the prospect of repeat financing of accounts at 2-1/2 percent a month is less valuable than the prospect of the same accounts being refinanced at 3 percent a month, this does not change a premium paid for the prospect of refinancing into something else. Only if taxpayers were willing to lend money at less than the maximum amount allowable under the law would it be possible to suggest that the premium was attributable to the high interest rates on small loans. 6/ Taxpayers' references to the

6/ Indeed, this is the fallacy of taxpayers' purported reliance (Br. 31) on Section 171's provision with respect to amortizable bond premiums. That section is predicated on a recognition that a corporation, or even the Government, may float a bond issue in a year when the interest rate is five percent. Several (Continued)

high interest rates paid on small loan contracts thus seem simply an attempt to make the legal question submitted to the Tax Court appear to be a factual question only.

This same form of argument would also seem to underlie taxpayers' statement that (Br. 26)--

> The Commissioner has not in this appeal contended that the trial court wrongly determined that the value of the payments in question, including that portion if any which was paid for the prospect that the loans would be refinanced, would be exhausted in three or five years.

This is precisely the Commissioner's argument. The premium was paid, not for the contracts themselves, but primarily for what taxpayers have called (Br. 32, heading D) "a valuable right accompanying a loan contract". This severable asset, which taxpayers themselves have segregated on their books, is goodwill, and, as this Court held in Boe v. Commissioner, supra, it does not depreciate or wear out as specific loan contracts are renewed or paid off.

6/ (Continued) years later, the interest rate for a bond with that degree of safety may go down to four percent but the bond coupons will continue to pay cash equal to five percent of the face amount. The market will reflect the new lower interest rate by increasing the price of the bond (premium) so that the annual cash paid (although still five percent of face value) will yield an effective rate of four percent. Thus, a purchaser is permitted to amortize the premium so as to reflect the fact that only part of the annual interest payment represents interest to him and the balance really is a return of capital. In this case, however, none of the premium was attributable to taxpayers' willingness to accept less than the maximum rate of interest and there is no evidence to support any claim that the premium was paid because of the high interest rates.

In Boe, as part of the purchase of a contract medical practice, the purchasers allocated $270,042.81 to the outstanding 8,984 contracts. The issue on appeal was whether the cost of these contracts represented non-amortizable goodwill, as the Commissioner contended, or whether their cost could be deducted as individual contracts were cancelled or not renewed. It should be noted that taxpayers' position in Boe was far stronger than taxpayers' position here because taxpayers were not there claiming the right to amortize the cost of the contracts over any particular period but were only seeking to deduct the costs as contracts were actually terminated.

This Court noted that these contracts, while unenforceable, represented a list of customers who were expected to continue to patronize the practice. So here, Seaboard had no assurance that any loan contract would be renewed (II-R. 205), and, indeed, the various state laws would not permit an enforceable contract providing for a term longer than 36 months and some states had shorter terms. But, as this Court stated (307 F. 2d 339, 342-343)--

> * * * the contracts, though terminable at will, gave sufficient assurance of continued patronage to taxpayer and his associates that they were willing to pay a large sum for Dr. Callison's practice. We have defined good will as "the sum total of those imponderable qualities which attract the custom of a business" (Grace Bros. v. Commissioner, 9 Cir., 1949, 173 F. 2d 170, 175-176). We there pointed out that good will may attach to the number and quality of the customers of the business. To us, the essence of good will is the expectancy of continued patronage, for whatever reason.

Moreover, although taxpayers in Boe conceded that goodwill is not a depreciable asset, this Court did not unquestioningly accept that concession. It went on to explain why the purchaser of a customer list could not deduct a portion of the cost of that list as individual customers on the list ceased to continue their patronage by quoting Judge Goodman's statement in National Metropolitan Laundry Co. v. United States, 100 F. Supp. 803, 805 (N.D. Cal.), that (307 F. 2d 339, 343)--

> "The gradual replacement of old patrons with new ones is not to be regarded as the exchange of old capital assets for new and different ones, but rather as the process of keeping a continually existing capital asset intact."

This is precisely the Commissioner's position here. As we have seen, the most significant value factor for which the premium was paid was the prospect that existing patrons would renew their contracts. This is goodwill, and while we agree that the average customer would "run off" the books at the end of three to five years, the goodwill element is not regarded as attributable to any particular contract or group of contracts and may not be amortized or deducted simply because old customers are replaced by new ones.

Indeed, the validity of Judge Goodman's analysis of the nature of goodwill as a continuing, non-amortizable asset can be demonstrated in a slightly different way. Even if we assume that at the end of five years every single one of the customers whose

contracts taxpayers had purchased at a premium had gone off taxpayers' books, 7/ this would not mean that taxpayers had no goodwill. Quite the contrary, the gradual replacement of the old customers with new ones is the process by which that asset is kept intact, and we can expect that if Seaboard chose to sell its office to another loan company at the end of such a five-year period, the particular contracts then on hand would continue to command a premium because of the anticipated prospects of refinancing.

This, too, is the thrust of Judge Hand's comments in United States Industrial Alcohol Co. v. Helvering, 137 F. 2d 511, 513-514 (C.A. 2d):

> In such an industry -- for that matter, in any industry -- continuity of sales is a condition of continued existence; once they stop, it is extremely hard, if not impossible, to start up the business again. Therefore the power to sell over the period immediately after the business is taken over, insuring as it does against such a break, has a value quite independent of any profit that may be got from those particular sales. There is no reason to suppose in the case at bar that the taxpayer would have paid anything whatever for the contracts if they had not contributed in this way to the continued existence of the business.

7/ This assumption is itself inaccurate because the record shows that while only 60 percent of the outstanding accounts during any period would be refinanced (i.e., those that do not go off the books), between 25 and 30 percent of the remaining accounts were former borrowers who had gone off the books for a period and then negotiated new loans. (II-R. 176.)

Taxpayers' efforts to distinguish these and other cases, which they lump under the rubric of the "indivisible asset" rule (Br. 38-46), stems from a failure to recognize that these cases are not based on any technical conceptions with respect to the burden of proof but on a basic analysis of the nature of goodwill as the prospect of continued patronage that is independent of the particular individuals who make up a firm's customer list at any given moment.

Thus, taxpayers here assert that the result in Boe would have been different if taxpayer had shown (Br. 42) "that he made an effort to value them [the medical contracts] individually * * *." Is this so? This Court stated that the decision in Boe was not based on a failure of proof; and, more important, why should the rules be different simply because taxpayers here made a more detailed effort to value the components of goodwill? To be sure, taxpayers in this case did examine the contracts to determine which ones exhibited a prospect of continued patronage, but this did not change what they were purchasing or the reason for their payment of a premium. 8/ "The essence of goodwill is the expectancy of con-

8/ Indeed, Mr. Weidman tesitifed (II-R. 201) that it is impossible to allocate any portion of the premium to any particular loan account and, of course, the premiums at issue are the net premiums, i.e., reduced by the discount received on those contracts reflecting high risks of non-collectibility.

tinued patronage" (Boe v. Commissioner, supra), and all that taxpayers accomplished by spreading the accounts was the ability to make a far more accurate valuation of the worth of goodwill than is usually possible in other industries.

Indeed, the suggestion that the result in Boe would have been different if the purchasers had troubled to go through each one of the 8,984 contracts to determine the age and the degree of use, etc., that could be expected from each of the contracting patients seems completely inconsistent with this Court's description of goodwill as an asset that is kept intact by a continual process of change. Although the expectancy of patronage must come from existing patrons, it does not diminish as those patrons are replaced with new ones. Moreover, if taxpayers' position is to be sustained, we can expect a great volume of future litigation as purchasers of businesses seek to convert payments for goodwill into amortizable assets by the simple expedient of examining the customer structure of the businesses they are about to purchase so that they can allocate their goodwill payments on a customer-by-customer basis.

The other distinction advanced by taxpayers, based on the nature of the assets involved, is equally untenable. Taxpayers state that (Br. 41) "Seaboard purchased contracts calling for a 'determinable amount of income' over an 'ascertainable period'." If by this

statement they mean to imply that the purchased contracts were for stated amounts over terms running from three to five years, this is not true. No contract could possibly extend for more than 36 months, the maximum term permitted by any state laws, and since they were all existing contracts, the average term (exclusive of refinancing) must have been considerably less than 36 months. The record makes it indisputably clear that the premium was not paid for the value inherent in the existing contract terms but because of the expectancy that the various contracting borrowers would enter into one or more new contracts. Each contract had value in itself because it was a promise to pay money and each group of contracts had value because they represented an active list of customers that experience indicated would enter new contracts. In spreading the accounts, taxpayers made it clear that the latter value of the contracts (their value as a customer list) was severable from the contracts and that they were limiting the payment of a premium (the difference between the A and A+ contracts) to those contracts whi h their experienced evaluators determined were most likely to be the source of repeat business. In short, the cases relied on by the Commissioner cannot be distinguished on the ground that they involved assets (Taxpayers' Br. 41) "like customer lists and * * * contracts which in practical effect are like customer lists" because that is exactly what is

involved here. Each contract was not only a contract but one name in a customer list.

The Tax Court's legal error stemmed from its acceptance of the same erroneous legal arguments and distinctions advanced by taxpayers to this Court. The Tax Court thought that the issue was whether the amounts involved were "premiums paid on purchased loan contracts" or "goodwill" (I-R. 106) and concluded that 70 percent of the amount involved was attributable to premiums. The point that the Tax Court failed to grasp is that the premiums are payments for goodwill because, in addition to the other factors underlying Seaboard's decision to purchase (such as avoidance of start-up costs and other going concern elements), the most significant value factor underlying the payment of a premium was that the contracts were an active list of customers that were an anticipated source of future patronage.

The Tax Court purported to distinguish the cases (Boe, supra; Thrifticheck Service Corp., supra; and United States Industrial Alcohol Co., supra) relied upon by the Commissioner on exactly the same grounds (nature of asset and proof of detailed valuation of the prospect of repeat business) that the taxpayers press upon this Court. If, as we submit, those cases represent a correct and comprehensive analysis of the nature of goodwill, then they are not distinguishable from the instant case, and the Tax Court's

error in failing to apply the rule of law they announce is unquestionably a legal, rather than factual, error.

In sum, the undisputed and indisputable evidence shows that in addition to their value as a group of contractual promises to pay money, each group of contracts was also valuable because it represented a list of active customers who were expected to be a source of future contracts. Taxpayers' experienced evaluators segregated these value elements, and their value as a potential source of repeat business was the most significant factor underlying the premium payments in question. Under the decisions of this Court and other courts, a payment for the "expectancy of continued patronage" is a purchase of goodwill, an intangible asset that does not depreciate as old patrons are replaced by new ones. Accordingly, the Tax Court erred in permitting the taxpayers to deduct the price paid for the severable goodwill elements that accompanied the contracts purchased over the life of the contracts (plus estimated period of refinance).

II

TAXPAYERS' CROSS-PETITION FOR REVIEW

Taxpayers' arguments as cross-petitioners are in substance protective arguments urged only in the event that this Court agrees with the Commissioner that the question is a factual one. However, we submit that if this Court agrees that the Tax Court

misunderstood the nature of goodwill and erroneously distinguished undistinguishable precedents of this Court and other courts, of necessity a remand for entry of decision in favor of the Commissioner is required. 9/

CONCLUSION

The decision of the Tax Court should be affirmed insofar as it held that 30 percent of the net premiums in issue were attributable to the purchase of non-amortizable goodwill and going concern value.

Respectfully submitted,

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JANUARY, 1966.

9/ We do wish to point out that A.R.M. 34, 2 Cum. Bull. 31 (1920), has no application to the purchase of assets that are in substance customer lists.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1965.

FRED R. BECKER
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,158

ESTELLE LATTA,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEE

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FILED
SEP 28 1965
FRANK H. SCHMID, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,158

ESTELLE LATTA,

Appellant

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

BRIEF FOR APPELLEE

This is an appeal from an order of the District Court for the Northern District of California, Fourth Division, dated March 25, 1965, granting the motion for summary judgment made by the appellee, the Securities and Exchange Commission ("Commission"), which was the plaintiff below.

COUNTERSTATEMENT OF THE CASE

On March 11, 1963, the Commission's complaint was filed and a temporary restraining order was issued (R. 36) [1/] which continued, with

1/ "R. ___" refers to the transcript of record filed with this Court on June 3, 1965. "D. ___" refers to appellant's deposition. "Br. ___" refers to appellant's brief. "T. ___" refers to the transcript of testimony of L. C. Moore.

the consent of appellant, until April 16, 1963 when a preliminary injunction by consent was entered (R. 37). After the filing of the Commission's amended complaint (R. 7) and appellant's answer consisting of a general denial (R. 14), on July 6, 1964 the Commission moved for summary judgment or in the alternative for an order narrowing the issues (R. 15) and submitted in support thereof various affidavits (R. 1, 4, 18, 21), a transcript of testimony and appellant's deposition. Appellant sought to oppose the Commission's motion (R. 23) and moved for summary judgment in her favor (R. 37) but submitted nothing in support (R. 37). By order dated March 25, 1965 (R. 28), the District Court granted the Commission's motion for summary judgment. Appellant filed a notice of appeal on April 13, 1965 (R. 31). Judgment was entered on April 26, 1965, permanently enjoining appellant from offering for sale or selling to the public in violation of the registration provisions of the Securities Act of 1933 ("Act") certain securities consisting of fractional interests in the proceeds of a purported estate of Mark Hopkins and enjoining her from making any untrue statements or omissions of fact in connection therewith (R. 44-48).

A. Facts:

Appellant claims to be an heir of Mark Hopkins (D. 25, 32-33) who died over 85 years ago. For many years she was engaged, alone and

with others (D. 13-14), in securing powers of attorney from purported heirs of Mark Hopkins which authorized her to act as attorney-in-fact in attempting to recover and arrange a redistribution of the Hopkins estate based upon alleged invalidity of the 1883 decree of distribution (D. 27-28, 89-91). To raise money to conduct litigation to accomplish such a redistribution of the Hopkins estate (D. 45, T. 8), appellant offered for sale and sold (D. 13, 43) to purported heirs of Mark Hopkins and to other persons (D. 43, R. 19, T. 10, 23) instruments entitled "Contract in Event of Recovery" (D. 5, R. 20, T-exhibits 1 through 9, 11 and 12). In addition, appellant has supplied contracts signed in blank (D. 4-5, 8, T. 16) to other people who offered and sold them to the public (D. 16-18, 44-45, 50-58, R. 1-6, 18-19, T. 25-26). Each contract assigned to the purchaser for a consideration of $100, one per cent of 1/5 of 1/6 of 1/7 interest of the Hopkins estate (R. 20, 39).[2/] Purchasers of such contracts were to receive a proportionate preference to the purported redistribution of the Hopkins estate (D. 68, T. 50-51) upon appellant's successful conduct of litigation to invalidate the 1883 distribution of the estate.

2/ This amounts to a 1/21,000th interest in the purported estate (T-exhibit 10).

Appellant has continually represented that the Hopkins estate can be recovered (D. 35-36, 74-77, 89-91, R. 1, 4-5, 18-19, T. 19-20, 56)[3] and has concealed from investors the fact that any reasonable expectation of recovering the Hopkins estate was effectively eliminated by the decision of this Court in Latta v. Western Investment Company, 173 F. 2d 99 (C.A. 9, 1949), cert. denied, 337 U.S. 940. That case affirmed the dismissal of an action by this appellant (D. 26-28) and others seeking a decree voiding the 1883 decree of distribution of the Hopkins estate. This Court held that the 1883 decree validly distributed the Hopkins estate and that the claims asserted were barred by the statute of limitations and by gross laches.[4]

B. Questions Presented:

This appeal raises only two questions:

(1) Whether the record shows any genuine issue as to any material fact; and if not

(2) Whether the Commission was entitled to judgment as a matter of law.

3/ Indeed, even after the entry of the preliminary injunction, appellan conducted a meeting at which she described a suit to recover the estate (R. 18-19).

4/ See also, Freeman v. Hopkins, 32 F. 2d 757 (C.A. 9, 1929) cert. denied, 290 U.S. 535, where it was earlier held that laches barred an attempt to tamper with the distribution of the Hopkins estate.

ARGUMENT

I. The Record Shows That There Is No Genuine Issue As To Any Material Fact.

Viewing the case in a light most favorable to the appellant, the record amply shows that the Commission has met the burden of establishing the absence of any genuine issue as to any material fact and that it is entitled to judgment as a matter of law. At no time during the proceedings below and nowhere in her brief has appellant shown any issue of material fact to be in dispute. The mere assertion that there are disputed issues of fact is, of course, insufficient to defeat summary judgment. Boyce v. Merchants Fire Insurance Co., 204 F. Supp. 311 (D. Conn., 1962) affirmed 308 F. 2d 806 (C.A. 2, 1962).

Although appellant in her brief (Br. 15-18) blandly asserts that "all material facts of this controversy" are disputed, 5/ it is clear from the record that the following facts — which are the only material facts in the case — are not in dispute:

Appellant offered and sold (D. 13), by herself (D. 13, 43) and supplied to others who sold (D. 16-18, 44-45, 50-58, R. 1-6,

5/ Appellant's assertion that disputed facts exist is wholly unsupported. Her attempt to create the illusion of disputed issues of fact in her brief is based upon a few statements taken entirely out of context which relate to immaterial facts and include her own conclusions drawn from her deposition as to the legal consequences of ultimate facts (Br. 15-18).

18-19, T. 25-26), to purported heirs of Mark Hopkins and to other persons (D. 43, 62, 64, R. 19, T. 10, 23) [6/] a certain "Contract in Event of Recovery" (D. 5-6, R. 20, 39, T-exhibits 1 through 9, 11 and 12) by the use of the mails or the facilities of interstate commerce (D. 53-54, 56-57, R. 4-5, T. 3A-4, 5, 13-14, 38, 40, 43), no registration statement having been filed with the Commission in connection therewith (R. 26); and appellant represented that the purported Hopkins estate could be recovered (D. 35-36, 74-77, R. 1, 4-5, 18-19, T. 19-20, 56) and that she was able to effect such recover (D. 21, 23-24, 25, 31, 32, 34-35, 91-93, T. 20-21).

The undisputed existence of many of the foregoing facts is established by admissions contained in the appellant's own deposition. Such

6/ Although in her brief (Br. 14, 15, 16) appellant attempts to discredit the affidavit of Cornelia Hopkins (R. 4) and the testimony of L. C. Moore, she admitted in her deposition that each of these people sold contracts signed by her (D. 16-18, 50-58). Moreover, the existence of cancelled checks payable to and endorsed by appellant for contracts sold by L. C. Moore (T-exhibits 4, 5, 6) render frivolous the suggestion that there is any factual dispute as to the relationship between appellant and L. C. Moore.

facts are likewise supported, and the undisputed existence of the remaining facts are amply established, by the affidavits and testimony offered by the Commission in support of its motion for summary judgment.

In concluding that there was no genuine issue as to any material fact, 7/ Judge MacBride correctly disregarded any incompetent material

7/ Appellant's suggestion (Br. 8-10) that Judge MacBride applied an incorrect standard of proof of the absence of any issue as to any material fact is unfounded. Judge MacBride stated in his Memorandum and Order as follows:

> "Due to the fact that the defendant has filed no affidavits in contradiction to those filed by the Securities and Exchange Commission, the only task left for the Court is to examine plaintiff's affidavits and determine whether they contain sufficient evidence to establish a prima facie case for any or all of the counts contained in the complaint. That is, if the facts necessary to establish any of the counts in the Commission's complaint are clearly set forth in its affidavits, then its motion for summary judgment will be granted.
>
> "After a careful examination of the entire record in this case, it is the opinion of this Court that no genuine issue as to any material fact exists. Further, the Court finds that every fact necessary to establish each count of the plaintiff's complaint has been clearly set forth in the affidavits submitted by the Commission. It is thus the decision of this Court that the injunction sought by plaintiff should be granted." (R. 29-30.)

footnote continued

which may have been contained in the Commission's affidavits.[8] There is no requirement, as appellant appears to suggest, that the Court specify the portions of the supporting affidavits on which it relies and those portions which are disregarded. Indeed, appellant's assertion that Judge MacBride erred in not making specific rulings on the evidence in the record wholly misconceives the purpose of summary judgment to elimin

cont'd.

7/ It is obvious from the second paragraph quoted above that Judge MacBr was not referring to the standard of proof of the non-existence of di puted issues of fact, but rather to whether the Commission was entitl to judgment as a matter of law.

Even if, however, appellant's contention were correct, this Court has stated that on appeal of the granting of summary judgment it is not concerned with the reasons of the District Court but only with whethe the judgment entered was right. Castner v. First National Bank of Anchorage, 278 F. 2d 376 (C.A. 9, 1960).

8/ See Cromwell v. Hillsborough Township, 149 F. 2d 617 (C.A. 3, 1945) affirmed, 326 U.S. 620; 6 Moore's Federal Practice ¶ 56.22, pp. 2334-2335 (1953). See also, Hoston v. J. R. Watkins Co., 300 F. 2d 869 (C.A. 9, 1962).

ie need for a trial and trial-type procedures where there is no genuine ssue as to the material facts. Appellant has, in essence and erroneusly, attempted in her brief to "cross-examine" the Commission's affiavits (Br. 11-16, appendix). By so doing appellant has sought to raise material issues about details of the manner in which certain affiavits set forth facts that are clearly not in dispute.

I. The Commission is Entitled to Judgment as a Matter of Law.

Judge MacBride found that the "Contract in Event of Recovery" s an investment contract or certificate of interest or participation nd hence a security within the meaning of Section 2(1) of the Act, 5 U.S.C. 77b(1), and concluded that appellant was engaged in the offer nd sale of unregistered securities in violation of Section 5(a) and (c) f the Act, 15 U.S.C. 77e(a)(c).[9/]

An investment contract involves a contract, transaction or scheme hereby a person invests money in a common enterprise and is led to expect rofits solely from the efforts of others. E.g., Securities and Exchange ommission v. W. J. Howey Co., 328 U.S. 293, 298-99 (1946); Los Angeles rust Deed & Mortgage Exchange v. Securities and Exchange Commission, 85 F. 2d 162, 166-172 (C.A. 9, 1960) cert. denied, 366 U.S. 919. The ontracts sold by appellant, which assign fractional interests in the roceeds of the purported Hopkins estate, clearly involve a common

9/ The text of Sections 2(1) and 5(a) and (c) is set forth in a statutory appendix.

enterprise. And it is equally clear that any profit to the investor is to come solely from appellant's successful efforts to conduct litigation to recover the Hopkins estate. By her own admission, appellant has spent years of effort on the Hopkins estate (D. 21, 23-24, 25, 31, 32, 34-35, 91-93, T. 20-21)[10/] and believes that she has the key to invalidating the 1883 decree of distribution of the estate (D. 35, 74-7

Contrary to appellant's unsupported assertion (Br. 20-21), this case does not involve the collective efforts of a family or group of heirs to recover an estate.[11/] Contracts have been sold to persons who appellant conceived to be "heirs at law and those that are connected by blood or marriage or an intimate friend" (D. 43)[12/] located throughout the country (D. 44) who, inter se, are strangers (D. 46-47). However, under appellant's concept, a person can become an heir merely by purchasing a contract (D. 64). In addition, heirs have resold their

10/ Indeed, appellant claims to have dedicated her life to this case (D. 31). She has written a newspaper column about the estate (R. 22 d) and even a book (R. 19, 21).

11/ Even if appellant's assertion were correct, it does not necessarily follow that the offer and sale of a security would not be involved.

12/ Although appellant has claimed no exemption from registration under Act for the contracts and the burden of establishing any such exempt would have rested with her, it is clear that the offer and sale of t contracts was a public offering of securities under the Act and that there is no color of any private offering exemption under Section 4(2), 15 U.S.C. 77d.

contracts to other persons who are not heirs (D. 62). Because appellant has obtained powers of attorney from over 500 purported heirs (D. 10, 12),[13] the role of such heirs is entirely passive; accordingly, the likelihood of anyone other than appellant being able to take steps to recover the estate is remote, even assuming for purposes of argument that she can do so. Although appellant claims in her brief that redistribution of the estate will be based upon "kinship" (Br. 20), she testified in her deposition that the estate will be redistributed "in proportion to the contracts here to be paid off first as debits (sic), . . . whether they are heirs or not. This is just the same as a note against the estate . . ." (D. 68).[14] Unless these contracts convey an interest in the purported estate without regard to any "kinship," their very existence would be a patent fraud. It is clear, therefore, that the terms of the offer, the economic inducements held out to the prospective purchasers, the results dependent upon someone other than the purchaser, and the common enterprise, all combine to make the contracts offered and sold by appellant securities. The Commission is accordingly entitled to jugement as a matter of law that appellant sold such securities without registration in violation of the Act.

3/ There is even testimony that appellant represents all such heirs that could be found (T. 11).

4/ See also T. 50-51.

Judge MacBride also found that appellant misrepresented facts and withheld material facts from investors in violation of Section 17(a) of the Act, 15 U.S.C. 77q (R. 43).[15/] In particular, appellant represented that the purported Hopkins estate was recoverable without disclosing that the possibility of any such recovery was effectively eliminated by the decision of this Court in Latta v. Western Investment Company, supra.[16/] Indeed, the mere sale of contracts which attempt to assign an interest in the purported estate, without disclosing that this Court held that the 1883 distribution is valid and that any attempt to set aside that distribution at this time is barred, is inherently

15/ The text of Section 17(a) is set forth in the statutory appendix.

16/ The decision in the Western Investment Company case is presumed vali and is not open to collateral attack by appellant here. See, e.g., Hill v. United States, 284 F. 2d 754, 756 (C.A. 9, 1960), cert. denied, 365 U.S. 873; Coffman v. Cobra Mfg. Co., 214 F. 2d 489, 491 (C.A. 9, 1954) cert. denied, 348 U.S. 912, reh. denied, 348 U.S. 956. It is nevertheless pointed out that the Western Investment Company case did not involve "probate matters" as appellant suggests (Br. 19), but rather was an action for declaratory relief based upon diversity of citizenship, clearly within the jurisdiction of this Court.

fraudulent and misleading.[17] Compare, Farrell v. United States, 321 F. 2d 409, 418 (C.A. 9, 1963) cert. denied, 375 U.S. 992. In addition, appellant admits that she deliberately concealed from purchasers the intended use of moneys received from the sale of contracts (D. 36).[18] It is thus equally clear that the Commission was entitled to judgment as a matter of law that appellant violated Section 17(a) of the Act.

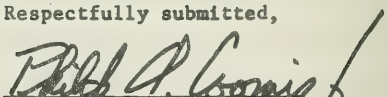
17/ While the honesty of appellant's beliefs might be relevant in a criminal case, it is not germane here, for as the Court has stated, "Section [17(a)] 77q(a)(2) creates a violation if there be proved any untrue statement of a material fact or any omission to state a material fact. . . ." Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission, 264 F. 2d 199, 210 (C.A. 9, 1959).

18/ "Q. You never told anyone what this money was to be used for?
A. Never told any of them, because it is none of their business." (D. 36.)

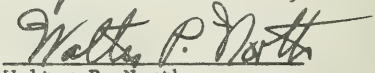
CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

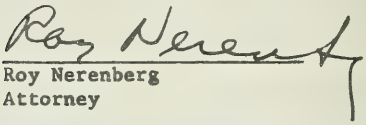
Respectfully submitted,



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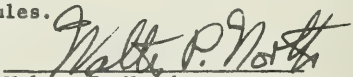
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Washington, D.C. 20549

September 1965

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Walter P. North
Associate General Counsel

APPENDIX

Securities Act of 1933

15 U.S.C. 77b(1)

SEC. 2. When used in this title, unless the context otherwise requires—

(1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. 77d(2)

SEC. 4. The provisions of section 5 shall not apply to—

* * * * *

(2) transactions by an issuer not involving any public offering.

15 U.S.C. 77e(a) & (c)

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;[4] or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. 77q(a)

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

No. 20158

In the

United States Court of Appeals

For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Respondent,
vs.
ESTELLE LATTA,
Defendant and Appellant.

Appellant's Opening Brief

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No. 20158

In the

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SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Respondent,
vs.
ESTELLE LATTA,
Defendant and Appellant.

Appellant's Opening Brief

I.

PRELIMINARY STATEMENT

In seeking reversal of the summary judgment entered against her in this case, the defendant contends that the District Court erroneously sponsored two principles, one express and one implied, which violate accepted standards of procedural due process and thwart the orderly administration of civil justice.

1. The expressly stated principle is that on a motion for summary judgment, when the opposition relies on defects in the moving party's case rather than on counter-affidavits, the Court's only task is to see if the moving

party has established a prima facie case for the counts contained in the complaint. If so, the motion for summary judgment will be granted.

2. The impliedly stated principle is that the Securities and Exchange Commission has jurisdiction over the sharing of expenses, including legal expenses, in a family cooperative effort to preserve certain legal rights.

Neither of these principles, in the defendant's view, is justifiable.

II.

JURISDICTIONAL STATEMENT

A. On Appeal

The jurisdiction of this Court is invoked under 28 United States Code # 1291.

B. In the District Court

The jurisdiction of the District Court was invoked under 15 United States Code ## 77e(a), 77e(c), 77q(a)(2), 77q(a)(3) and 77v(a).

The action taken by the District Court (*i.e.*, the granting of a summary judgment for permanent injunction) was based on Rule 56 of the Federal Rules of Civil Procedure.

III.

STATEMENT OF THE CASE

The plaintiff filed a complaint for injunction on March 11, 1963, which was followed by a preliminary consent injunction on April 16, 1963 and by the defendant's answer on May 20, 1963.

On October 11, 1963, the plaintiff filed an amended complaint for injunction in three counts. (Clerk's Transcript, p. 7.)

The first count charged a violation of 15 United States Code ## 77e(a) and 77e(c), alleging that the defendant was using means of interstate commerce and the mails to sell and offer to sell securities, *i.e.,* investment contracts and certificates of interest and participation in profit-sharing agreements, by use of a prospectus and otherwise, for sale to members of the public on the representation that she would conduct litigation to recover the estate of Mark Hopkins and Moses Hopkins. The defendant was allegedly carrying those securities and causing them to go through interstate commerce for sale and delivery. No appropriate registration statement was on file with the Securities and Exchange Commission.

The second count charged a violation of 15 United States Code # 77q(a)(3), alleging that the defendant was carrying on the activities described in the first count by transactions, practices and a course of business which operated as a fraud and deceit on the purchasers of the securities because she was making untrue, misleading and deceptive statements of material fact representing and implying that judicial action which she was bringing may void a judicial decree of 1883, distributing the Mark Hopkins estate, and that the Mark Hopkins estate was subject to being judicially distributed to the so-called rightful heirs and the purchasers of securities. The defendant allegedly also made other untrue, misleading and deceptive statements of material fact with similar meaning and import.

In so doing, the second count further alleged, the defendant was omitting to state material facts that would make the statements not misleading, namely that her earlier complaint in the United States District Court was dismissed after she tried to have the Hopkins estate distribution declared void, and that the Ninth Circuit Court of Appeals

upheld the dismissal, ruling that the distribution was valid and had distributed the entire estate and that the defendant's claims were barred by the California statute of limitations and by laches.

The third count charged a violation of 15 United States Code # 77q(a)(2), alleging that the defendant was carrying on the activities described in the first and second counts to directly and indirectly obtain money and property.

By an answer filed November 20, 1963 the defendant denied these allegations. (C.T. 14.)

In a series of motions and memoranda, beginning July 6, 1964, both the plaintiff and the defendant requested summary judgment in his own favor and opposed the other's requests for such relief. The plaintiff's motions were based on the pleadings, the deposition of the defendant, the sworn testimony of L. C. Moore, the affidavits of Cornelia Hopkins, H. T. Nichols, Albert Sheppard and Jack Redden, and a certificate of the Records Officer of the Securities and Exchange Commission. The defendant's motions were based on the incompetency of the plaintiff's purported evidence, on the conflicts in the plaintiff's own evidence, on the innocent inferences which should have been drawn from the plaintiff's evidence, and on the defendant's ability, at trial, to establish a valid defense on the merits. (C.T. 1, 4, 15, 18, 21, 23, 25.)

The District Court heard this matter on October 26, 1964 and took it under submission. On March 25, 1965, the District Court issued a memorandum and order granting the plaintiff's motion for summary judgment, and ordering the plaintiff to prepare a formal injunction against the defendant. (C.T. 28.)

On April 15, 1965 the defendant filed a notice of appeal from the order granting the plaintiff's motion for summary judgment. (C.T. 31.)

The District Court, as of April 26, 1965, formally approved the findings of fact and conclusions of law submitted by the plaintiff, and formally executed a summary judgment of permanent injunction. (C.T. 34, 44.)

This appeal followed.

IV.

STATEMENT OF PURPORTED FACTS

The plaintiff has taken the position (which the District Court has adopted) that there are no genuine issues of material fact in this case. (C.T. 16, 30.) If that position were valid (which the defendant denies), the following facts would have been established to support the summary judgment here:

A. Mark Hopkins Estate and Contract Claimants

1. The fortune left by Mark Hopkins was distributed after his death by a decree entered in 1883 (C.T. 37.)

2. The defendant claims to be a "double blood heir" of Mark Hopkins, and is an author who has frequently written about her efforts to recover the Hopkins estate for the "rightful heirs." (C.T. 37.)

3. For many years the defendant has secured powers of attorney from purported Hopkins heirs authorizing her to act in their behalf in trying to recover and redistribute the Hopkins estate. (C.T. 38.)

4. During this period, the defendant has been offering and selling to purported Hopkins heirs and to other individuals instruments entitled, "Contract in Event of Recovery," which provide for fractional distribution of the Hopkins estate, if it is recovered by the administrator of the estate. (C.T. 39.)

5. Many of these contracts have been offered and sold to members of the public. (C.T. 39.)

6. If enough contracts were sold at $100.00 each to dispose of shares in 100% of the estate, the defendant would realize a total of $2,100,000.00 (The defendant, however, did explain that some contracts have been given to "deserving persons" or issued for services.) (C.T. 40.)

7. The defendant has not disclosed to contributors the manner in which the money raised through sale of contracts will be spent because that is "none of their business." (C.T. 40.)

B. Instruments as Securities

1. The contracts "in event of recovery" are "investment contracts" and "certificates of interest and participation" and therefore "securities" under 15 United States Code #77b(11). (C.T. 40.)

2. No appropriate registration certificate has been filed with the Securities and Exchange Commission. (C.T. 41.)

C. Litigation to Establish Claims to Mark Hopkins Estate

1. The Ninth Circuit Court of Appeals definitively disposed of the claims of contract holders, as well as other alleged heirs of Mark Hopkins, in *Latta v. Western Investment Co.* (1949) 173 F.2d 99. (C.T. 41.)

2. Alleged heirs of the Hopkins estate had brought suit in 1927 to establish a trust in their favor of property allegedly belonging to the Hopkins estate. (C.T. 41-42.)

3. The 1927 litigation alleged concealment of assets by the widow and brother of Mark Hopkins, but the suit was dismissed by the District Court "because of laches" and for "want of equity." The Ninth Circuit Court of Appeals affirmed the decree of dismissal in *Freeman v. Hopkins* (1929) 32 F.2d 756. (C.T. 42.)

4. The defendant has continued soliciting investments in the Hopkins estate after the Court of Appeals barred

any reasonable expectation of recovery from that source. (C.T. 42.)

D. Use of Mails and Facilities of Interstate Commerce

The defendant has used the mails and facilities of interstate commerce to offer, sell and deliver the securities to investors, and to carry out her deceitful and untruthful course of business in connection with the sale of the securities. (C.T. 42.)

V.

OPPOSITION TO PURPORTED FACTS

The defendant contends, and has consistently contended, that there are genuine issues of material fact to be determined in this case and that the summary judgment was improperly granted. (C.T. 24.)

VI.

QUESTIONS PRESENTED

1. On motion for summary judgment, when the opposition relies on defects in the moving party's case rather than on counter-affidavits, should the motion be granted if the moving party has done no more than establish a prima facie case for the counts contained in the complaint?

2. On a motion for summary judgment, when the opposition objects to material testimony in the moving party's affidavits, is it proper for the Court to state that it will disregard the incompetent parts of the affidavits while giving full effect to the competent parts, without specifying which parts it considers incompetent and which competent?

3. On a motion for summary judgment, is it proper for the Court to find that no genuine issue of material fact exists when the moving party's own purported evidence shows that genuine issues of material fact do exist?

4. Is the action taken by a federal court on what is essentially a California probate and estate matter a definitive disposition of that matter, so that failure to refer to the federal court action becomes a material concealment of fact in transactions affecting the estate?

5. Is the sharing of expenses, including legal expenses, in a family cooperative effort to preserve certain legal rights, an activity that falls within the jurisdiction of the Securities and Exchange Commission?

VII.

ARGUMENT

A. To Justify a Summary Judgment, the Moving Party Must Do More Than Establish a Prima Facie Case Since the Burden of Proof on Such a Motion Is Much More Strict Than at a Trial on the Merits

The District Court's basis for awarding the plaintiff a summary judgment was clearly—and erroneously—expressed in the Memorandum and Order of March 25, 1965:

> Due to the fact that the defendant has filed no affidavits in contradiction to those filed by the Securities and Exchange Commission, the only task left for the Court is to examine plaintiff's affidavits and determine whether they contain sufficient competent evidence to establish a prima facie case for any or all of the counts contained in the complaint. That is, if the facts necessary to establish any of the counts in the Commission's complaint are clearly set forth in its affidavits, then its motion for summary judgment will be granted. (C.T. 29-30.)

By formulating such a proposition, the Court has denied the plaintiff a trial on the merits and has violated accepted standards of procedural due process.

The true standard against which a motion for summary judgment must be gauged is significantly different from what the District Court has utilized. Under the correct rule, the burden of proof on a motion for summary judgment is much more strict than a trial on the merits. All inferences of fact from the proofs proferred at the hearing must be drawn against the moving party and in favor of the party opposing the motion. To determine whether the moving party has satisfied his burden, the papers supporting his position must be closely scrutinized while the opposing papers should be indulgently treated. *Kilfoyle v. Wright* (5th Cir. 1962) 300 F.2d 626. See also *Bozant v. Bank of New York* (2d Cir. 1946) 156 F.2d 789.

Not only must the moving party show the absence of any genuine issue of fact, he must also show that there is no real question about the credibility of his evidentiary material. Where there is the slightest doubt about the facts, the motion for summary judgment should be denied. *Hilton v. Triangle Publications, Inc.* (S.D.N.Y. 1961), 27 F.R.D. 468 (which granted a motion for summary judgment). See also *Colby v. Klune* (2d Cir. 1949) 178 F.2d 872 (which reversed a summary judgment because issues of credibility existed).

Applied to the present case, where the District Court acknowledged valid objections to the competency of the plaintiff's evidence and where the entire record shows opposition to some material allegations and ambiguous proof as to other material allegations, these principles obliged the District Court to grant the defendant her due—a trial on the merits.

Where there is the slightest doubt as to the facts, a litigant has the right to a trial (and a denial of that right is reviewable) because:

> . . . although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose

for which courts have been established. Denial of a trial on disputed facts is worse than delay.

Doehler Metal Furniture, Inc. v. United States (2d Cir. 1945) 149 F.2d 130, 135.

Having misconceived the basis for granting a summary judgment, the District Court committed such prejudicial error that its judgment must be reversed as incurable on appeal.

B. When a Court States It Will Disregard Incompetent Evidence in the Moving Party's Affidavits But Does Not Specify Which Evidence It Considers Incompetent and Which Competent, the Moving Party Should Not Be Entitled to Summary Judgment if There Is Any Doubt About the Competency of Its Material Proof

Despite the generally commendable effects of Rule 43 of the Federal Rules of Civil Procedure, liberalizing the rules of evidence in favor of admissibility, and despite the usual presumption that a court, sitting as a trier of fact, will disregard incompetent evidence, the defendant was prejudiced here by the District Court's failure to segregate competent evidence from incompetent matters in the plaintiff's documentary materials.

The District Court stated that it would "disregard" the incompetent parts of the plaintiff's affidavits, while giving "full effect" to the competent parts. (C.T. 29.) In so doing, the Court sought to comply with Rule 56(e) of the Federal Rules of Civil Procedure, which provides standards of admissibility for such documents, and with the settled rule that the court must disregard affidavits which contain only hearsay and legal conclusions. See *Engelhard Industries, Inc. v. Research Instrument Corp.* (9th Cir. 1963) 324 F.3d 347. Unfortunately for the defendant, however, the Court failed to specify which purported evidence fit into which category.

As indicated in *New York Life Insurance Co. v. Wilkinson Veneer Co.* (D.C.La. 1949) 86 F. Supp. 863, on which the Court relied, the same rules governing admissibility at trial will govern the admissibility of affidavit evidence. At a trial, of course, a party is expected to make timely objections to incompetent evidence or else he waives his right to exclude those matters. When he makes the objection, he is favored with a specific ruling as to the validity of his complaint. The trial attorney knows, to cite an example, whether a witness named Albert Sheppard could place in evidence, over objections, the statement that:

> ". . . According to my sister and brother-in-law, Mr. Moore represents Estelle Latta regarding this estate.
>
> "I paid $100 in cash to my sister for a contract called 'CONTRACT, In the Event of Recovery', a copy of which is attached as Exhibit A. As will be noted, it is dated December 27, 1963, and is apparently signed by Estelle Latta and witnessed by Mr. and Mrs. L. C. Moore. . . . I assume Mr. Moore handed it to her (*i.e.,* my sister) at the time she gave him the $100." (C.T. 18.)

The trial attorney knows, to continue this example, whether that objectionable statement could be used to support the Finding of Fact that:

> "Also, for many years, the defendant has been engaged in offering and selling to alleged heirs of Mark Hopkins and their descendants, as well as to other individuals, instruments entitled 'Contract in Event of Recovery', a specimen of which is set forth below:
>
> CONTRACT
>
> 'In Event of Recovery'
>
> 'For and in consideration of One Hundred Dollars ($100.00) to me in hand paid—the receipt for same is hereby acknowledged. I hereby assign and set over to
>
> (NAME) Mr. Albert Sheppard
>
> ... (Etc.) ..." (C.T. 38-39.)

The trial attorney knows, to conclude this example, whether Albert Sheppard's hearsay statements about the defendant would be stricken and entirely disregarded because of his testimony about the only direct contact he had with her:

> "*She did not try to sell any contracts at that time* and stated if anyone did not believe in what she was trying to do, that she did not want them involved in it." (C.T. 19. Emphasis added.)

The trial attorney, therefore, knows what this defendant can never know—whether the Court properly excluded from its consideration all incompetent matters. Not knowing this, the defendant can only trust that the same Court which refused to permit a trial on the merits was uniformly correct in determining what matters would influence its decision. Surely no litigant should be asked to surrender her rights so easily.

Emphasizing the importance of evidentiary issues like this, the United States Supreme Court has stated (in *Speiser v. Randall* (1958) 357 U.S. 513, 520, 2 L. ed 1460, 1469, 78 S.Ct. 1332):

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance as fully as great as the validity of the substantive rule of law to be applied."

To show that the plaintiff's evidence was unable, because of incompetency, to support the summary judgment, we need only examine the materials which the plaintiff introduced.

1. THE AFFIDAVITS

a. Jack Redden's affidavit (C.T. 21-22) declares in substance that as part of his work for the Securities and Exchange Commission he has seen a newspaper which contains a column purportedly written by the defendant, that he has seen advertisements for the sale of the defendant's book, and that he has seen a photograph of the defendant. Mr. Redden also has incorporated a copy of a newspaper column purportedly written by the defendant, though the purpose of this exhibit is not specified.

b. Albert Sheppard's affidavit (C.T. 18-19), as discussed above, contains only one competent statement about the defendant, namely, that on December 29, 1963, she gave a talk at the R.E.A. Building in Newman, Georgia, where her main topic was about a pending federal suit supposed to involve a Wells Fargo Bank trust fund in excess of three billion dollars, about Wall Street, and about the Securities and Exchange Commission.

All other aspects of Mr. Sheppard's affidavit (except for his eyewitness statement that the defendant did not try to sell any contracts at the time he heard her speak) deal with Mr. Sheppard's own identity, residence, and former occupation, as to which the defendant has no concern, or with incompetent matters formed exclusively of hearsay, opinions, and unsupported assumptions.

c. H. T. Nichols' affidavit (C.T. 1-3), except for statements about Mr. Nichols' own duties, position and activities, contains only incompetent hearsay. Nichols, an interested party to these proceedings since he is an employee of the Securities and Exchange Commission, has based his affidavit on interviews with "a number of witnesses" (C.T. 1), most of whom are not identified. He has shown no direct knowledge of any of the activities with which the defendant has been charged.

d. Cornelia Hopkins' affidavit (C.T. 4-6) is the most detailed statement on which the plaintiff has relied, yet a close analysis of that document reveals how inference, opinion, speculation and conclusions of law have been fatally intermixed in Mrs. Hopkins' remarks. The evidentiary weaknesses of this affidavit are examined, line by line, in Appendix A.

Taken as a whole, what Mrs. Hopkins has said amounts to nothing more than a collection of facts harmless to the defendant and inconsistent with jurisdiction in the Securities and Exchange Commission.

Examples:

". . . I obtained agreements from fourteen Georgia heirs . . ." (C.T. 4, par. 3, line 6) shows that Mrs. Hopkins, and not the defendant, carried out a particular transaction, and that the persons whom Mrs. Hopkins contacted were not part of the general public, but were instead members of a specific, unique family group—the descendants of Mark Hopkins.

"It was understood between Mrs. Latta and me . . ." (C.T. 5, par. 1, lines 2-3) is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundation to show the defendant's state of mind or knowledge.

". . . I began to have some suspicions about the deal . . ." (C.T. 5, par. 1, line 4) is Mrs. Hopkins' incompetent, gratuitous and unwarranted opinion, which tends to create prejudice and hostility against the defendant.

* * * * * * *

If the Court had disregarded the incompetent matters contained in these affidavits, it would not have been able to sustain the summary judgment. By stating that it has disregarded the incompetent matters, without making specific

rulings about the purported evidence, the Court has in no way cured the defects in the plaintiff's proof.

C. The Plaintiff's Own Evidence Contains Competent Testimony Which Can Sustain a Judgment for the Defendant and Which Puts Into Dispute All Material Facts of This Controversy

1. THE TESTIMONY OF L. C. MOORE

The sworn testimony of Mr. L. C. Moore is contained in the Official Report of Proceedings Before the Securities and Exchange Commission, dated February 6, 1963 and contained in the Record on Appeal as item number 43. (Page references refer to the pages of that Report.)

Mr. Moore's testimony contains competent matter which, if believed, would sustain a judgment for the defendant in this action.

Whether that testimony is believed or not, it is inconsistent with other testimony by Mr. Moore, so that the internal discrepancies alone bar a summary judgment.

Mr. Moore has sworn (Report, p. 12):

> "Q. Did you enter into any agreement with Mrs. Latta?
>
> "A. No.
>
> "Q. What are your duties *of* (or) functions in connection with the distribution of these contracts to which you refer?
>
> "A. Not anything at all."

Asked (Report, p. 10), "Who was selling these contracts, Mr. Moore?" he answered, "I don't know." Asked (Report, p. 22), "How long have these contracts—over what period have they been sold?" he answered, "I don't know." Asked (Report, p. 29) about telephone conversations he had with the defendant, he testified in this manner:

> "Q. Well, during these telephone conversations with her do you discuss the amount of money that has been raised?
>
> "A. No, sir."

Asked (Report, p. 34) how the defendant received certain money, Mr. Moore testified, "I don't know how she got that one, whether it was up at Durham or here or in California." Asked (Report, p. 38) how the defendant received carbon copies of certain contracts, he said, "I don't know. It might have been Durham. It might have been California."

Throughout his testimony, Mr. Moore did offer evidence about his own activities, but this conduct is irrelevant to the defendant's activities unless and until competent evidence clarifies Mr. Moore's relationship to the defendant. Nothing in the Report shows that the defendant should be held responsible for what Mr. Moore may have done.

2. THE DEPOSITION OF ESTELLE LATTA

The deposition of Estelle Latta, the defendant, contains facts which put into dispute virtually every contention made by the plaintiff on this motion for summary judgment. (This deposition is contained in the Record on Appeal as item number 42; page references refer to pages of that deposition.)

For those matters not directly disputed there are so many logical inferences favorable to the defendant from the 93-page transcript that no clear statement of facts is possible without a trial on the merits.

According to the Findings of Fact adopted by the District Court (C.T. 37), "The fortune left by Mark Hopkins who died about eighty-five years ago was distributed some eighty years ago in accordance with a decree of distribution entered in 1883."

But according to the defendant's deposition that finding is erroneous. Asked (Deposition, p. 89) about this subject, the defendant gave the following testimony:

"Q. What disposition was made of his estate?

"A. What disposition was made of his estate?

"Q. Yes.

"A. There was no disposition ever made of his estate, not legally."

With the Finding (C.T. 38) that the defendant has been offering and selling written instruments to alleged heirs of Mark Hopkins and their descendants, "as well as to other individuals," the Court has made a factual determination in conflict with the following testimony (Deposition, p. 62):

"Q. I thought you said you sold these to heirs and their intimate friends and family connections?

"A. I said the heirs had sold them to the intimate friends."

When the plaintiff's attorney stated (Deposition, p. 62), "As a matter of fact, you told Mr. L. C. Moore that he could sell these contracts to anybody, anybody who could—" the defendant responded, "No, I didn't tell Mr. L. C. Moore anything of the kind. I have kept this estate free, Mr. Latta."

To the question (Deposition, p. 66), "Have you accepted money from personal friends of yours?" she answered, "No." Elsewhere (Deposition, p. 29), she said, "I did not sell the contracts."

The defendant (Deposition, pp. 28-29) explained other matters in this fashion:

"Q. From the sale of the contracts, was that money used in the expenses of litigation?

"A. They have always given—I told you this is no contract. It is nothing more than just a receipt to get—that is no contract. That is no security."

To the inquiry (Deposition, pp. 21-22), "Let's put it this way, Mrs. Latta. What does a person who buys a contract such as this get for his $100?" the defendant answered in

a manner that contradicts the plaintiff's allegations and the Court's Findings:

> "I think I have answered that. This contract here entitled 'In the event of recovery' is nothing but a receipt because some of the heirs will pay for their part of the investigation.
>
> "Now, say, for instance, you looked at the number of the millions of acres of Federal Land Grants that I have put a direct claim of interest on. How much do you suppose it costs the law firm to draw up those? Well, who is going to pay for it? Somebody has to pay for it.
>
> "Well, if they pay for it, that means that they get this out of the estate before anybody else gets it, gets a part, if we get the contracts together and settle with the people. It is just as simple as all that, and it is the only way in the world—as the lawyer says, I didn't make the contracts. The contracts were made years ago because the heirs were so poor—the estate was stolen from them. They had to even sell the contracts to prove the heirship, and the heirship is proven everywhere, and I have never known an intervention before in my life in the prosecuting of a private estate before."

With such testimony in the record, the Court could not properly declare that no genuine issues existed as to material facts in this controversy. The conflicts are too fundamental to be disposed of in summary fashion.

D. Earlier Litigation Against the Mark Hopkins Estate Is Not Necessarily Material to the Issues in the Present Case

Nowhere has it been competently proven that the defendant concealed earlier litigation which would bar a distribution of the Mark Hopkins estate, although the plaintiff so alleged (C.T. 10, 36), the Court so found (C.T. 41-42), and the Court so concluded (C.T. 43).

Nowhere does the plaintiff or the court take into account the principle that an honest belief in the truth of a matter condones misstatements—(see *Stone v. United States* (6th Cir. 1940) 113 F.2d 70)—although the defendant's belief in what she has been saying permeates every part of her testimony.

Through a misplaced reliance on *Latta v. Western Investment Co.* (9th Cir. 1949) 173 F.2d 99, the District Court has found that the Ninth Circuit Court of Appeals had "definitively disposed of the claims of contract holders as well as other alleged heirs of Mark Hopkins." (C.T. 41.)

By so ruling, the District Court has committed error since the state courts of California, and not the federal courts, alone have the power to "definitively" dispose of the claims of the heirs to an estate. Probate matters, as such, are beyond federal jurisdiction.

What the Ninth Circuit Court of Appeals has said about the Mark Hopkins Estate in *Latta v. Western Investment Co., supra,* is obiter dicta, not required by the issues before the court. For this reason it is a question of specific fact as to whether or not that case constitutes significant litigation which the defendant has a duty to disclose regardless of circumstances.

As to *Freeman v. Hopkins* (9th Cir. 1929) 32 F.2d 756 (see C.T. 41-42), the same lack of ultimate jurisdiction in a federal court makes the issues of materiality and deliberate deceptiveness a question of fact in the specific circumstances of each alleged nondisclosure. In *Freeman, supra,* it should be noted, the heirs claimed *no* interest in the real property of which Mark Hopkins had been possessed at the time of his death. That fact alone distinguishes the *Freeman, supra,* litigation from the defendant's alleged activities in this case, and reinforces doubts about the materiality of the earlier litigation.

Neither materiality nor concealment nor fraudulent intent has been shown in the plaintiff's purported evidence to support its motion for summary judgment.

E. Neither the Attempt by Heirs to an Estate to Recover Their Inheritance Nor Their Sharing of Expenses, Including Legal Expenses, Places Their Activities Within the Jurisdiction of the Securities and Exchange Commission

According to the District Court's Findings (C.T. 40), the "Contracts In Event of Recovery" are "investment contracts" and "certificates of interest and participation," and are therefore "securities" under the jurisdiction of the Securities and Exchange Commission. This case presents a situation, so that Court has found (C.T. 40), in which the economic welfare of "investors" is "inextricably woven" with the ability of the promoter, *i.e.,* the defendant, to carry out a common enterprise for the benefit of those whose "investments" are "solicited."

But under the test laid down in *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.* (9th Cir. 1960) 285 F.2d 162, a case where the defendants had admitted selling to the public, the real question was said to be:

Is the investor led to expect profits *solely* from the efforts of one or more defendants arising from a common enterprise? (Emphasis added.)

In the present case, the defendant's role, according to her deposition, is to assist herself and other heirs to reach a position where their own efforts, *i.e.,* their family ties to Mark Hopkins, will enable them to claim their inheritance. The kinship will determine the benefits they receive—and the defendant cannot create or damage those family relationships.

This is not a case where a group of strangers, a random section of the public, abdicates its control over funds in

the hopes that someone else will acquire a profit for them but, rather, is a case of a family seeking to regain what it believes is its own. Under such facts, if they are facts, the plaintiff lacks power to interfere with the heirs' family activities; under such evidence, if the facts are yet to be established, the Court lacks power to grant summary judgment.

To support its conclusion that the interests allegedly sold in this matter are "securities" within the jurisdiction of the Securities and Exchange Commission, the plaintiff is likely to rely on an unreported oral memorandum by a United States District Court Judge. See *S.E.C. v. McBride* (D.C.M.D. Tenn. 1956); see also Record on Appeal item number 21, Memorandum of Securities and Exchange Commission in Support of Motion for Summary Judgment, etc., filed July 6, 1964, p. 13.

In *McBride, supra,* after a full hearing on the merits where many witnesses testified, where documentary evidence was introduced, and (apparently) where the Commission's presentation was subjected to cross-examination and rebuttal evidence, the Court held that the disputed instruments were "securities."

We cannot, however, assume that because certain interests in a lawsuit over oil, gas and mineral rights have once been deemed securities, that all interests in litigation are securities, provided the parties are sufficiently numerous.

The orderly administration of civil justice would be disrupted if the Securities and Exchange Commission could claim jurisdiction over family cooperative efforts to preserve legal rights, on the ground that the family is investing in its own welfare without having conformed with Commission requirements. No such powers can be engrafted

into the Securities Act of 1933, as amended, and no such powers to regulate private litigation can constitutionally be given to an administrative body. Due process is offended when the Securities and Exchange Commission assumes for itself the judicial function of determining which litigation may properly be carried on by which interested parties.

VIII.

CONCLUSION

The District Court's granting of the plaintiff's motion for summary judgment was erroneous because:

1. Genuine issues of material fact are in controversy and have not been eliminated by the plaintiff's purported evidence.

2. The Securities and Exchange Commission lacks jurisdiction over the sharing of expenses, including legal expenses, in a family cooperative effort to preserve legal rights, such as exist here.

The summary judgment against the defendant should therefore be reversed.

Dated: August 30, 1965.

Respectfully submitted,

George T. Davis
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San Francisco, California
Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

George T. Davis

(Appendix Follows)

Appendix A

The affidavit of Mrs. Cornelia Hopkins, on which the plaintiff so much relies to establish its facts, contains inference, opinion, speculation and conclusions of law fatally intermixed with what may be competent statements. In this Appendix, the Hopkins affidavit will be analyzed in detail to show why it cannot properly support a summary judgment against the defendant. (Page references are to the Clerk's Transcript.)

a. C.T., p. 4, paragraph 1, lines 8-10:

(1) "To my knowledge" gives no foundation showing how, if at all, Mrs. Hopkins obtained that knowledge. As offered, the statement is nothing more than an improper attempt to avoid objections that Mrs. Hopkins' remarks are incompetent. On this ground alone, the court should reject the affidavit.

(2) "In order to raise funds for this purpose" is Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, since it refers to matters outside Mrs. Hopkins' knowledge.

(3) "Made a public offering" is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundations, on a subject that is a matter of law, namely, what is "public" and what is an "offering"?

b. C.T., p. 4, paragraph 3, lines 4-8:

(1) "Negotiations" is a meaningless word which gives no indication of what, if anything, was said between the parties and, if something had been said, the purpose to which the statements had been directed. Specifically, no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship can be inferred from the word "negotiations", nor can any of Mrs. Hopkins' later

actions be said to have been connected with these negotiations or with the defendant.

(2) "Approval" does not indicate the things which the defendant allegedly approved, nor does it show that the defendant's approval was a necessary or even a desired condition for Mrs. Hopkins' later actions.

(3) "I telephoned . . . I obtained" shows that whatever transactions did occur were performed solely by Mrs. Hopkins and not by the defendant.

(4) "Agreements from fourteen Georgia heirs" shows that the persons whom Mrs. Hopkins contacted were not part of the general public, but were members of a specific, unique, family group—the descendants of Mark Hopkins.

(5) "One contract (was) purchased by my husband" shows that Mr. Hopkins bought a contract. Nothing in this statement indicates that the defendant knew he had recently crossed a state line, that the defendant had induced him to cross the state line, that the defendant had offered to sell anything to him, or that the defendant, in any way, directly or indirectly, influenced him to make the purchase. These gaps in information also apply to the statement in Mrs. Hopkins' affidavit (Paragraph 3, lines 8-10) that Mrs. Della Hopkins Noland purchased one contract.

c. C.T., p. 4, paragraph 4, lines 1-3:

(1) "For the purpose of delivering these" is Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, except for any purpose known to Mrs. Hopkins and not known to the defendant. It was Mrs. Hopkins and not the defendant who carried the contracts. Since no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship has ever been shown between Mrs. Hopkins and the defendant, no purpose of Mrs. Hopkins can be attributed to the defendant.

(2) "Securities . . . (and) . . . investors" represents Mrs. Hopkins' opinion and conclusion, unsupported by competent evidence or proper foundation, on subjects that are matters of law, namely, what are "securities" and what are "investors"?

d. C.T., p. 5, paragraph 5, lines 1-3:

"By arrangement with Mrs. Latta" is a meaningless phrase which gives no indication of what, if anything, was arranged between the parties. Specifically, no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship can be inferred from this phrase, nor can any of Mrs. Hopkins' later actions be said to have been connected with this "arrangement" or with the defendant.

e. C.T., p. 5, paragraph 1, line 1:

"At the instruction of Mrs. Latta" gives no details about the meaning and purpose of the language supposed to have been an instruction, nor does it show whether the remarks were actually suggestions which Mrs. Hopkins could freely ignore as the gratuitous expression of one acquaintance talking to another.

f. C.T., p. 5, paragraph 1, lines 2-3:

"It was understood between Mrs. Latta and me" is the opinion and conclusion of Mrs. Hopkins, unsupported by competent evidence or proper foundation, to show the defendant's state of mind and knowledge.

g. C.T., p. 5, paragraph 1, lines 4-6:

(1) "I began to have some suspicions about the deal" is Mrs. Hopkins' incompetent, gratuitous and unwarranted opinion, included in this affidavit as a means, surely, of creating prejudice and hostility against the defendant.

(2) "And never sent any copies to her, but retained the pink copies" negates any employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship

inferred between the defendant and Mrs. Hopkins and therefore bars the inference that the defendant directly or indirectly committed acts within the Commission's jurisdiction.

h. C.T., p. 5, paragraph 2, lines 1-10:

(1) "My first visit to Durham", "I paid", "I took back", "I sent", "Then I sent", "I went to Durham a second time and gave", and "I turned over" all show that it was Mrs. Hopkins, and not the defendant, who engaged in acts which might give rise to jurisdiction in the Commission. Since no employer-employee, vendor-purchaser, partnership, principal-agent or similar relationship has been established between the defendant and Mrs. Hopkins, Mrs. Hopkins' activities give no basis for jurisdiction over the defendant.

(2) "All of my checks . . . were on our personal checking account" shows that Mrs. Hopkins and her husband exercised dominion and ownership prerogatives over the money they received, thus negating control by the defendant.

i. C.T., p. 5, paragraph 3, lines 1-6:

(1) "I called two mass meetings" shows action, not by the defendant, but by Mrs. Hopkins.

(2) "Primarily for the purpose of making progress reports to the investors" shows Mrs. Hopkins' purpose, but not the defendant's, and also improperly uses a legal conclusion—"investors"—to describe the audience.

(3) "I would explain to them the necessity for obtaining funds to fight the lawsuit" shows Mrs. Hopkins' activities, but not the defendant's. Provided Mrs. Hopkins has not under local law been guilty of champerty or maintenance, her right to assist in litigation is not a forbidden act and is not, as presented, within the Commission's jurisdiction.

(4) "[I] would state that if anyone wanted to invest any money in the venture, I would take it" shows what Mrs. Hopkins said and was willing to do, but does not show any action or intent by the defendant.

j. C.T., p. 5, paragraph 4, lines 1-2:

(1) "I never received any commissions or other remuneration" negates any employer-employee, partnership, principal-agent or similar relationship between Mrs. Hopkins and the defendant.

(2) "I was repaid incidental expenses" does not show who repaid the expenses, why they were repaid, or whether any duty to repay them existed.

k. C.T., p. 5, paragraph 4, lines 3-5:

(1) "Mrs. Latta made a number of telephone calls from Durham to my home when she would discuss the estate" shows that conversations were conducted about a matter of inheritance between prospective heirs and not, as presented, about a subject within the Commission's jurisdiction.

(2) "[She would] press for more money" is an argumentative and incompetent conclusion which gives Mrs. Hopkins' opinions of her conversations with the defendant, rather than the details of what, if anything, was said. "Press" is too ambiguous a word to represent a simple fact.

(3) "And urge further efforts to dispose of the contracts" is also an argumentative, incompetent conclusion which does not describe the meaning of "urge", "further efforts", or "dispose of" and therefore cannot establish any relationship between Mrs. Hopkins and the defendant or show the nature of any activity the defendant has allegedly performed. Without details, Mrs. Hopkins' generalizations are valueless.

l. C.T., pp. 5-6, paragraph 5, lines 1-6:

"Eventually . . . I disassociated myself from the deal entirely" negates a vendor-purchaser or similar relationship between the defendant and Mrs. Hopkins, and refers only to actions by Mrs. Hopkins which are irrelevant to any thing the defendant has done. The conclusions of Mrs. Hopkins are not only irrelevant but incompetent as well.

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PETITION TO REVIEW AND SET ASIDE
ORDER OF NATIONAL LABOR RELATIONS BOARD

MILLIKAN, MONTGOMERY,
FRANCISCUS and OLAFSON

By: C. E. MILLIKAN, JR.
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NO. 20157

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMCO ELECTRIC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF

QUESTIONS PRESENTED

Questions presented as stated on page 2 of Petitioner's Opening Brief.

STATEMENT OF FACTS

Statement of facts, except as set forth in the argument are as stated in petitioner's brief on pages 2, 3, 4 and 5.

SPECIFICATION OF ERROR

Specification of error as stated on page 5 of Petitioner's Opening Brief.

SUMMARY OF ARGUMENT

In addition to the summary of argument listed on page 6 of Petitioner's Opening Brief, petitioner makes the following additional arguments:

I AMCO HAS NOT ADMITTED NOR IS THERE SUBSTANTIAL EVIDENCE TO SHOW THAT AMCO FIRED FIVE MEN, INCLUDING CROWE, BECAUSE THEY HAD QUIT THE WEEK BEFORE TO PROTEST THE RECLASSIFICATION OF A WELDER.

II THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR USING THE RADIO. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR GIVING LOWATER, A FOREMAN, ORDERS AND THAT SAID ORDERS WERE MADE OVER THE RADIO.

III THE EVIDENCE CLEARLY SHOWS THAT CROWE WAS PRIMARILY INTERESTED IN GETTING LOWATER OVER TO SITE C AND CONSEQUENTLY THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT RESPONDENT'S CONTENTION THAT CROWE WAS PRIMARILY INTERESTED IN GETTING SAVAGE TO SITE C.

IV THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ANY CONCLUSION THAT CROWE WAS FIRED BECAUSE OF ANY PROTECTED ACTIVITIES. THERE IS SUBSTANTIAL EVIDENCE SHOWING THAT CROWE WAS

FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN.

V THE TRIAL EXAMINER'S RESOLUTION OF CONFLICTING TESTIMONY WAS BASED UPON HIS OBSERVATION OF THE DEMEANOR OF THE WITNESSES AND NOT OTHERWISE AND AS THIS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE CANNOT PROPERLY BE OVERRULED.

VI WHILE THERE WAS NO SUBSTANTIAL EVIDENCE SHOWING CROWE WAS FIRED FOR CALLING HIS STEWARD, THERE WAS SOME EVIDENCE TENDING TO SHOW CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN, TO GO OVER AND GET SAVAGE AND CONSEQUENTLY, EVEN IF THIS VERSION WERE BELIEVED, IT DOES NOT SUPPORT THE CONCLUSION THAT CROWE WAS FIRED FOR ENGAGING IN PROTECTED ACTIVITIES.

VII PROVISIONS OF COLLECTIVE BARGAINING CONTRACT SECTIONS 10 AND 11 OF ARTICLE 3 DO NOT PERMIT A WORKMAN TO GIVE ORDERS TO FOREMEN AND THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT THIS IS EXACTLY WHY CROWE WAS FIRED.

ARGUMENT

Argument as covered in Petitioner's Opening Brief, pages 7 through 16, and the following additional arguments:

The brief for the NLRB contains several statements of fact which require clarification. The references hereafter made do not

cover all such statements, but instead are intended to cover those which are considered by Appellant to be material.

I

AMCO HAS NOT ADMITTED NOR IS THERE SUBSTANTIAL EVIDENCE TO SHOW THAT AMCO FIRED FIVE MEN, INCLUDING CROWE, BECAUSE THEY HAD QUIT THE WEEK BEFORE TO PROTEST THE RECLASSIFICATION OF A WELDER.

Crowe was one of five Amco employees who quit in protest of the classification of a welder during May, 1964. Respondent contends that Amco admitted that a week after the protest quitting (a month or so before the alleged discrimination), Amco laid off the same five employees because they had quit in protest the week before. There is no evidence to support the contended admission. Crowe did not so testify (Rep. Tr. p. 7). Business agent Milne, who gave the only other testimony concerning the matter, testified that the five men who had quit in protest were told about a week later they were to be laid off but didn't receive their checks and reported to work the next morning (Rep. Tr. p. 50). He further testified that Conley, Amco general foreman, told him these five people were laid off because they were the same five who had quit the week before (Rep. Tr. p. 50). This is not an admission that the layoff resulted from the protest the week before, but instead shows only that when Amco laid off some employees (which could have been for any number of reasons including the reason contended

by Respondent), it selected these five to lay off because they were the ones who had quit the week before. In any event, the Business Agent of the Union obviously convinced Amco that it would not be wise to let the men go under the circumstances and they continued at work. There is no evidence that the four men other than Crowe had any further problems. Any suggestion that the firing of Crowe on June 19 was connected with his protest quitting during May is pure conjecture. Business Agent Milne settled that dispute during May. The record thus shows that the Union was able to adjust disputes with the employer, even when the members were wrong in their position, as when the five employees walked off during May, a violation of Article I, Section 5 of the Contract between Amco and the Union.

II

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR USING THE RADIO. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR GIVING LOWATER, A FOREMAN, ORDERS AND THAT SAID ORDERS WERE MADE OVER THE RADIO.

Whether or not Crowe ever tried to call Steward Savage on the radio, as contended by Respondent, was disputed. Crowe said he did try (Rep. Tr. pp. 9, 10). Neither Coghlin nor Lowater, both of whom had their radios on, heard any such call by Crowe.

What Crowe said to Lowater on the radio when Crowe

called was disputed between Crowe and Lowater. Respondent contends that Lowater was merely asked to request Savage to go to C Site as testified by Crowe. Respondent agrees with Appellant that the evidence is in conflict on this point. However, Respondent states that Lowater agreed with Crowe (in response to Crowe's call) that his request for Savage to come to C Site would be delivered to Savage, and "added" that he would be right over himself (Respondent's Brief, page 4). The fact is that Lowater testified, in response to Crowe's call, that he, Lowater, would be right over (Rep. Tr. p. 91). That is all Lowater said to Crowe. His statement that he would be right over wasn't any thought added to a statement that Lowater would give a message to Savage. His testimony did not indicate that he told Crowe he would deliver a message to Savage (Rep. Tr. p. 91).

Respondent contends that both Cassidy, Crowe's foreman, and Lowater, the maintenance foreman, told Crowe that he was being fired because he had used the radio to call the steward and that this is undisputed. This is the biggest fallacy in Respondent's argument. The record has no support whatever for such a statement except Crowe's testimony (Rep. Tr. p. 13). Crowe's testimony was directly contradicted by Business Agent Milne (who said he didn't know of any men who were fired by Amco for improper use of the radio (Rep. Tr. pp. 52-53), by Norman Coghlin (who was reported by Steward Savage, Business Agent Milne and Foreman Lowater to have said "Who does he think he is, the foreman? He can't give orders around here." (Rep. Tr. pp. 32,

54, 92), and was not supported by either Cassidy or Lowater, who, Crowe said, made the statements to him. If either Cassidy or Lowater had made such a statement to Crowe as Crowe alone claims was made by each of them, it is clear from the record that such statement had to be fabrication by each of them, for there is no reason which can be found in the record for either of them to come to such a thought. Both Cassidy and Lowater heard Coghlin complain that Crowe was giving orders and neither said he heard any complaint that Crowe was using the radio. (It is also inconceivable in light of his previous activity in Crowe's behalf that Business Agent Milne would have permitted Crowe to be terminated for using the radio or for attempting to get in touch with the Steward without determined and conclusive intervention on Crowe's behalf.)

III

THE EVIDENCE CLEARLY SHOWS THAT CROWE WAS PRIMARILY INTERESTED IN GETTING LOWATER OVER TO SITE C AND CONSEQUENTLY, THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT RESPONDENT'S CONTENTION THAT CROWE WAS PRIMARILY INTERESTED IN GETTING SAVAGE TO SITE C.

Respondent, although apparently understanding that Amco employed only Electricians to do its work (Respondent's Brief, pages 2-3), seems to contend that the dispute with the Ironworkers over the fan was a dispute under the Amco-IBEW Contract. It

was not. Amco employed no Ironworkers. Amco wasn't violating its IBEW agreement when the Ironworkers were trying to do electrical work, and wouldn't have violated it if the Ironworkers had done the work. To the extent that the fan installation matter was a dispute, it was a jurisdictional dispute, not between Amco and its employees who were members of separate unions, but between the Electricians, Amco employees, and the Ironworkers, employees of Allied-Shaffer. What apparently happened was that Lowater was requested by the general contractor on the day in question to move a fan (Rep. Tr. p. 93). The Ironworkers foreman, the general contractor's employee (undoubtedly because he wanted to get the fan moved sooner than Lowater was moving it) directed his own men (Ironworkers) to move the fan rather than waiting for Lowater and the electricians. Crowe saw the fan being moved and asked the Ironworkers to quit. They did quit and agreed that they knew moving fans was electrical work (Rep. Tr. p. 10). When Lowater arrived at C Site in response to Crowe's call he immediately borrowed two electricians from Cassidy's crew and moved the fans (Rep. Tr. p. 92). He didn't remember even seeing Steward Savage at the site (Rep. Tr. p. 97), and there certainly wasn't any evidence of intervention or activity by Savage regarding any dispute with the Ironworkers. This was, of course, because the Ironworkers had agreed already with Crowe they would not move the fans and would wait for the electricians which agreement they carried out (Rep. Tr. p. 96). Whether or not Savage went to Site C made little difference because he needed to do nothing there

with the Ironworkers. The problem was taken care of by Lowater when Crowe got the Ironworkers to stop work and wait. Lowater and the electricians immediately moved the fan upon Lowater's arrival.

IV

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ANY CONCLUSION THAT CROWE WAS FIRED BECAUSE OF ANY PROTECTED ACTIVITIES. THERE IS SUBSTANTIAL EVIDENCE SHOWING THAT CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN.

The constant contention by Respondent that Coghlin and Conley were angered by efforts of Crowe to get Steward Savage to C Site just doesn't make any sense. No one has suggested the slightest reason why Amco would be displeased by Stewart Savage going to C Site or being called to C Site. He was known to be the Steward. Amco certainly knew that Steward's deal with disputes. Steward Savage was dealing with another Ironworker dispute at the time these events took place and there is no evidence that Amco was angered by or objected to his efforts. Not only is there no evidence of any reason for anger if the Crowe call was merely a search for the Steward, but no statement of counsel in argument has indicated any reason why Amco would be angered by such a search.

The only thing resembling a suggestion by Respondent of a motive for firing Crowe other than because of his giving orders to Lowater was made at the hearing. Counsel for the General

Counsel seemed to be suggesting at the hearing, although he never came right out and said so in so many words, that he considered this whole matter of Amco's complaint against Crowe on June 19 was a smoke screen by Amco and that Amco's real reason for firing Crowe was that he had quit in protest to the welder's firing during May, that his doing so was protected activity, and that Amco wanted to get even with him. The welder, incidentally, was an Electrician, not an Ironworker (Rep. Tr. p. 55). As stated before, the existence of such a motive on the part of Amco is the purest conjecture. Conjecture certainly is not sufficient basis for the Board to overrule the contrary finding of the Trial Examiner.

The only witnesses who heard Crowe's call, that is Lowater and Coghlin, both testified that Crowe told Lowater to come over to C Site, and Lowater answered to Crowe that he would be right over. Lowater went right over to C Site. Coghlin was angered at Crowe by what Crowe said over the radio to Lowater and said so immediately. What he was angered at was Crowe giving orders to Lowater and he said so immediately. There is absolutely nothing in the record except Crowe's contradicted and unsupported statement of what Cassidy and Lowater told him was the reason for his firing (using the radio to call the Steward) to indicate that the reason was anything other than Crowe's giving orders. Despite this record the Board overruled the Trial Examiner and found that Crowe was fired because he tried to communicate with his Steward during working hours.

Assuming that Lowater's version of his conversation with Crowe was the correct one (Lowater's version was that Lowater should get hold of Doc Savage and that Lowater should come over to C Site - Rep. Tr. p. 95) rather than Coghlin's (Coghlin's version was that Lowater should come over to C Site), Amco's statement that it was firing Crowe for wrongfully giving orders, stated openly and immediately by Coghlin and testified to by Stewart Savage, Business Agent Milne and Foreman Lowater as well as Coghlin, is nevertheless supported. The finding by the Board that the "reason for discharge was his (Crowe's) conduct in trying to communicate during working hours with his steward, who was at a different work site" is unsupported by substantial evidence and is pure conjecture. If Lowater's version of the Crowe radio call is accurate, the conversation of Lowater with Savage, reported by Milne and Savage, does not refute or cast doubt upon Amco's stated reason for firing Crowe. According to Lowater, Savage and Milne, Lowater, following the call from Crowe, stopped at Site 23 long enough to tell Savage that Crowe wanted Savage over at C Site. This is no indication that Crowe didn't also, during the call, order Lowater immediately to C Site to move the fan as testified by Lowater. The fact that upon telling Savage about the fan Lowater went immediately to C Site and moved the fan is strong corroboration that Crowe told or asked him to do so at that time (as both he and Coghlin testified).

Since Savage, Milne and Cassidy didn't hear Crowe's call, they couldn't and didn't testify that Crowe didn't order Lowater

immediately to C Site. Only Crowe says he didn't do so and his testimony is not corroborated in this respect by any act, omission or statement of anyone.

Since this is the record, there is nothing from which the Board could properly find contrary to the Trial Examiner that Crowe's effort to bring Savage and not Lowater to C Site was the reason for his discharge. There is no basis for the Board to find contrary to the Trial Examiner that it was a contributing cause.

The Trial Examiner's finding that Crowe was discharged because he told Lowater to come to C Site conflicts with no evidence whatever but Crowe's testimony that Cassidy and Lowater told him he was being fired for using the radio. Lowater, before leaving for C Site, saw Coghlin drive up to Site 23 and heard him complain that Crowe was giving orders (Rep. Tr. p. 92). Cassidy testified that Coghlin called for him on the radio and asked him if he or Crowe was running C Site, unquestionably a reference to giving orders. Cassidy said he was supposed to be. Conley came on the radio and told him to get Crowe's time ready (Rep. Tr. p. 41). No testimony from Cassidy was given to indicate he understood or told Crowe he was being fired for using the radio to call the steward. No evidence was given by Cassidy nor Lowater that they had any information that Crowe was being fired for using the radio to call the Steward. There is no evidence, therefore, which conflicts with the testimony of Coghlin and found to be a fact by the Trial Examiner, that the reason Crowe was fired was because he gave orders to Lowater to come to C Site. The Board stated this

was a reasonable finding but wanted to make its own contrary finding.

V

THE TRIAL EXAMINER'S RESOLUTION OF CONFLICTING TESTIMONY WAS BASED UPON HIS OBSERVATION OF THE DEMEANOR OF THE WITNESSES AND NOT OTHERWISE AND AS THIS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE CANNOT PROPERLY BE OVERRULED.

Respondent contends that it is clear from the record that the Trial Examiner's trust of Coghlin's testimony and distrust of Crowe's was not based on demeanor of witnesses. There is no basis for this contention. The Board is not privileged to ignore a finding that credibility was determined in part from demeanor of witnesses. It is well settled that the Board may disregard the findings of a Trial Examiner where he gives credit to unsupported testimony which conflicts with well supported and obvious inferences from the rest of the record. The converse of that rule is also true. Because the converse is true, the Trial Examiner's finding on veracity of Coghlin and lack of veracity of Crowe in this case cannot be overruled. As indicated above, the Trial Examiner's finding that Crowe was fired for ordering Lowater to C Site is supported by observations of demeanor of witnesses; by the incredibility of Crowe's statement that Cassidy and Lowater told him he was being fired for using the radio to call the steward (Rep. Tr. p. 13); by the fact that Lowater immediately after

Crowe's call went to C Site and moved the fan without incident (Rep. Tr. p. 92), although Crowe denied asking him to go to C Site and denied telling him to do so (Rep. Tr. pp. 21,); by the fact that Lowater testified that Crowe told him to come to C Site (Rep. Tr. p. 95); by the fact that Coghlin immediately after the call said he was going to fire Crowe for acting like the foreman and giving orders (Rep. Tr. p. 32); and by the fact that if Savage did go to C Site at all (Rep. Tr. p. 97) he didn't do so until after the fan had been moved by Lowater (Rep. Tr. p. 14).

VI

WHILE THERE WAS NO SUBSTANTIAL EVIDENCE SHOWING CROWE WAS FIRED FOR CALLING HIS STEWARD, THERE WAS SOME EVIDENCE TENDING TO SHOW CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN, TO GO OVER AND GET SAVAGE AND CONSEQUENTLY, EVEN IF THIS VERSION WERE BELIEVED, IT DOES NOT SUPPORT THE CONCLUSION THAT CROWE WAS FIRED FOR ENGAGING IN PROTECTED ACTIVITIES.

In its opening brief, Amco asked the rhetorical question (paraphrased from page 12 of the Opening Brief): If an order to a foreman to come to C Site would be a violation of Company discipline entitling the employer to terminate the employee, why would an order to a foreman to deliver a message to a steward not be entitled to the same conclusion? Respondent answers that Amco is now changing its position. This is not the case.

When this point is looked at carefully, the following items

are apparent and are relevant to the intended meaning of Amco's argument:

a. Mr. Crowe complained to the National Labor Relations Board that he was fired for using the radio to call his steward; that his call to the steward was connected with his engaging in protected activity, that he was not prohibited from using the radio and that therefore his firing was an act of unlawful discrimination prohibited by the Act.

b. The National Labor Relations Board issued a complaint against Amco Electric.

c. Amco answered that Crowe was fired for giving orders to a foreman when Crowe was not a foreman and was not permitted to give orders.

d. Crowe testified at the hearing that he was told by two Amco foremen, Cassidy and Lowater, that he was being fired for using the radio to call the steward.

e. Amco's superintendent, Coghlin, testified that Crowe was fired for giving orders to Lowater to go to C Site.

f. Cassidy testified that Coghlin complained about Crowe running Cassidy's job, an obvious complaint about Crowe giving orders, and testified to what he told Crowe about Crowe's being fired which didn't include any statement that Crowe was being fired for using the radio.

g. Lowater testified that Coghlin, immediately after Crowe's radio call, complained that Crowe was giving orders and would be fired, and Lowater didn't testify that he told Crowe he

was being fired for using the radio.

h. David Milne, IBEW Business Agent, testified that he knew of no instance where Amco had fired an employee for improperly using the radio.

i. Doc Savage, IBEW steward on the Amco job, testified that Coghlin, immediately after Crowe's call, complained about Crowe giving orders and said he would fire him. Savage testified that Coghlin's complaint was that Crowe issued orders for Savage to go to C Site.

j. The NLRB, but not the Trial Examiner, found that Crowe was fired for attempting to communicate with his steward during working hours.

k. The Trial Examiner, but not the NLRB, found that Crowe was fired for giving orders to Lowater to go to C Site.

l. Only Lowater, Coghlin and Conley heard any call from Crowe. Conley didn't testify. Coghlin and Lowater both testified that Crowe told Lowater to go to C Site. Lowater answered Crowe that he would be right over. Lowater testified also that Crowe told him to tell Steward Savage about a dispute at C Site and to tell Savage to come over, which Lowater testified he did.

m. Lowater went immediately to C Site and moved the fan.

n. Coghlin complained immediately about Crowe giving orders.

It appears that if it weren't for substantial evidence rules, and if all of the evidence were not required to be considered,

three possible findings could have been made:

1. Crowe was fired for calling his steward on the radio during working hours (found by the Board).

2. Crowe was fired for giving orders to Lowater to go to C Site and move the fan (found by the Trial Examiner).

3. Crowe was fired for giving orders to Lowater for Savage to go to C Site (found by neither Trial Examiner nor Board).

As pointed out above, there is no support for the Board's actual finding except an inference from Crowe's testimony which is not a permissible inference in light of Respondent's other witnesses. At this point we should point out that only inference from Crowe's testimony supports the Board's finding because Crowe didn't testify that anyone other than Cassidy and Lowater told him he was fired for using the radio to call the steward. The evidence shows that neither Cassidy nor Lowater actually fired Crowe or decided to fire him. Even if Crowe is believed in his testimony that Cassidy and Lowater told him he was being fired for using the radio to call the steward, in order for this alleged statement of Cassidy and Lowater to progress to a finding of fact, that is, a finding of the reason for firing, it would be necessary to infer from their alleged statement that Cassidy and Lowater knew the reason Crowe was fired to be what Crowe testified he was told. The evidence of what Cassidy and Lowater knew doesn't permit such a conclusion so it prohibits such an inference.

In any event, of the three possible findings, the one found by the Board has no proper support. The one found by the Trial

Examiner has support in the evidence and the Board agrees that it does.

There is at least some evidence in the record which could have supported the finding that Crowe was fired for giving orders to Lowater to deliver a message to Savage to go to C Site (even though the support is insubstantial and insufficient to overturn the Trial Examiner's finding).

With this explanation added, on page 12 and page 13 of its Opening Brief, explained a different way, Amco's point was this: assume a finding had been made that Crowe was fired for giving orders to Lowater to deliver a message to Steward Savage to go to C Site; if such a finding had been made it would merely show that Crowe was fired for a reason somewhat different from that stated by Amco when the incident took place. The reason for the firing, if such had been the finding, would not show unlawful discrimination any more than does the reason for firing which has been stated by Amco from the beginning and found to be fact by the Trial Examiner. Therefore, since this third possibility is the only possible alternative finding to the Trial Examiner's which was supported by any evidence in the record, a case of unlawful discrimination was still not proved even if Coghlin's stated reason for firing Crowe is not believed.

Respondent argues at length that what Crowe said to Lowater, even if his choice of language was bad, or his tone of voice was not exemplary, was not an order, particularly because Crowe was an employee and Lowater was a foreman. This

argument begs the point completely. It appears that Coghlin and Lowater understood what Crowe said to be an order, command or direction (whichever word respondent would prefer). Lowater acted on it and Coghlin objected to it. Crowe knew he wasn't supposed to give orders and that they were to be given only by foremen (Rep. Tr. p. 26). He insisted, however, that all he did was to request Lowater to deliver a message for him. There is little indeed to indicate that this is all he did.

VII

PROVISIONS OF COLLECTIVE BARGAINING CONTRACT SECTIONS 10 AND 11 OF ARTICLE 3 DO NOT PERMIT A WORKMAN TO GIVE ORDERS TO FOREMEN AND THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT THIS IS EXACTLY WHY CROWE WAS FIRED.

Respondent also argues that the provisions in the contract (Sections 10 and 11, Article III) merely establish a chain of command and would not be violated by giving of orders by one who the contract indicated was to receive orders. In the first place, the IBEW is quite capable of enforcing and interpreting its contracts. The contract has ample provisions for adjusting disputes of that kind. This is not a proceeding brought for that purpose. In the second place, the construction of the contract made by the Board, to the effect that the contract was not violated by giving of orders by a journeyman, gives no answer to the question. It is at best only a very literal and technical interpretation. If a man is

hired to do his work as laid out and directed by his foreman, is required to take his orders only from a foreman and the contract requires the employer to designate a foreman for that purpose, which is the import of the contract provisions, it is true that the contract doesn't specifically prohibit the non-foreman from giving orders. It also doesn't require the employer to retain him as an employee when he does give orders thus doing the foreman's job instead of his own. Crowe knew the "chain of command" if that is how respondent would like to characterize the provisions of the contract (Rep. Tr. p. 26).

A fair reading of the contract would indicate, we believe, that a person familiar with the contract and hired as a journeyman electrician and not designated foreman would know good and well it wasn't his job to give orders. Crowe did. He would know that if he spent his time giving orders instead of doing his work his conduct would be subject to some kind of reaction from the employer when the employer learned what he was doing or attempting to do. Whether the reaction of firing was the best possible employer reaction to what was done by Crowe, or whether it would have been better to use a quantity of well chosen words emphatically spoken to Crowe is perhaps a good question, just as the means used in any case to maintain job discipline, and to get the work done are always subject to question. But this is an area of discretion which the employer is permitted to exercise under Section 5 Article II of the Contract, the employer being the one responsible for getting the job done. (NLRB v.

v. Almeida Bus Lines, C.A. Mass., 333 F.2d 725). The employer is responsible for efficiency and morale and job results will show whether he is right or wrong in how he runs his job. If he goes too far and the employee disputes his discipline, the Union grievance procedure may be set in motion. The employer is not permitted to discharge the employee because he is engaging in union activity, but he is permitted to fire the employee for good cause, without cause, or for an unjustified cause so long as union activity is not any part of the reason or reasons for discharge.

General Tire of Miami Beach v. NLRB, (C. A. Fla. 332 F.2d 58;

NLRB v. Florida Steel Corp. (C. A. 5) 308 F.2d 931.

If discrimination may be inferred from mere participation in union activity followed by discharge, that inference disappears when a reasonable explanation is presented to show that the discharge was not because of the union activity. Wellington Mill Division v. NLRB, (CASC) 330 F.2d 579, Cert. den. 379 U.S. 882, NLRB v. United Brass Works, Inc. (C. A. 4) 287 F.2d 689.

CONCLUSION

For the reasons stated in this and the opening brief, the petition for review should be granted, the recommended order of the Trial Examiner should be affirmed and the decision and order of the National Labor Relations Board should be reversed.

Respectfully submitted,

MILLIKAN, MONTGOMERY, FRANCISCUS and OLAFSON

By C. E. MILLIKAN, JR.

Attorneys for Petitioner

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ C. E. Millikan, Jr.

C. E. Millikan, Jr.

No. 20,157

In the United States Court of Appeals for the Ninth Circuit

AMCO ELECTRIC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 20,157

AMCO ELECTRIC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Amco Electric (herein "Amco") to review an order (R. 22-31)[1] issued against it on May 24, 1965, by the

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C. Exh." and "R. Exh." refer to exhibits of the General Counsel and petitioner, respectively. References preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

National Labor Relations Board, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[2] In its answer the Board requested enforcement of its order. The Board's decision and order are reported at 152 NLRB No. 86. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Vandenburg Air Base in California, where at the time, Amco, an electrical contractor, was engaged in the construction of missile sites.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that Amco discharged employee Donald L. Crowe because he engaged in union activity which was protected by Section 7 of the Act, and that Amco thereby violated Section 8(a)(3) and (1) of the Act. The Board's findings are based upon the following underlying facts:

A. *Background*

In the spring of 1964,[3] Amco held a subcontract from Allied Shafer, the general contractor, to perform electrical work at seven Minute Man Missile Sites at Vandenburg Air Base. Amco employed some

[2] The pertinent provisions of the Act are set forth, *infra*, p. 19.

[3] Unless otherwise indicated, all dates are in 1964.

60 electricians who were members of the Union [4] to do this work.

Discriminatee Donald Crowe, a union member, began working for Amco as a journeyman electrician on April 27. About the end of May, Crowe and four other Amco employees resigned in protest over the treatment of a fellow employee. The following day, the matter was adjusted through the efforts of the Union's business manager, David Milne, and the five returned to work (R. 10; Tr. 6). A week later, Amco laid off the same five employees, including Crowe, admittedly because of their protest the week before (T. 10; Tr. 7). Again, Milne intervened and arranged for the five to return to work on the following day (R. 10; Tr. 7).

B. *Crowe's discharge*

On June 19, the day of his discharge, Crowe was one of about 10 electricians working at missile site C under Foreman Raymond Cassidy. When Crowe, who was working in an underground capsule, made a trip to the surface to obtain supplies, he observed two Ironworkers lowering a fan down the access shaft (R. 23; Tr. 9). In response to Crowe's questions, the Ironworkers said that they had been ordered to install the equipment by their foreman, but conceded that the work belonged to the Electricians. Crowe asked them to suspend the work for a few

[4] Local 413, International Brotherhood of Electrical Workers, AFL-CIO.

minutes while he got in touch with his union steward.[5] The Ironworkers agreed. Crowe then walked to an Amco truck parked about 30 feet away which had a radio-telephone (R. 23; Tr. 9, 10). He tried twice to call Union Steward Wilbur Savage, whom he believed to be at Site D, some 3 to 5 miles distant, but without success (Tr. 10, 19-20). Crowe then tried to call Frank Lowater, an electrician foreman who travelled from site to site (R. 25; Tr. 10, 14, 20). Lowater received Crowe's call on his truck radio just as he arrived at Site 23, about 8 or 9 miles from Site C (R. 25; Tr. 91). Crowe asked Lowater if he knew where Steward Savage was. Lowater replied that Savage was there at Site 23. Crowe told Lowater about the problem with the Ironworkers, and asked him to transmit the information to Savage and ask Savage to come to Site C (R. 25; 13, 20, 91). Lowater agreed to do so, adding that he would be right over himself (Tr. 91).[6]

[5] Article II, Section 13, of the Union's contract with Amco provides for the appointment of a steward who "shall see that working conditions of this Agreement are observed." Section 13 provides further that, "Under no circumstances shall the Employer dismiss or otherwise discriminate against an employee for making a complaint or giving evidence with respect to an alleged violation of any provisions of this Agreement" (R. Exh. 1, p. 9). Article I, Section 5, provides, *inter alia*, that "All grievances or questions in dispute shall be adjusted by the duly authorized representatives of both parties to this Agreement" (R. Exh. 1, p. 2).

[6] Earlier that day, a superintendent of Allied Shafer, the general contractor, had given Lowater orders to install the same fan which the Ironworkers had been handling until asked to stop by Crowe (Tr. 93, 96).

Just before Crowe made his radio calls, Steward Savage, Union Business Manager Milne and an official of the general contractor, Allied Shafer, had met and resolved a different jurisdictional problem involving the Ironworkers (Tr. 30, 37). As that meeting broke up, Amco Vice President Norman Coghlin and Amco General Foreman Speck Conley drove up. Upon learning from Savage and Milne that the Ironworkers dispute had been settled, Coghlin and Conley left (Tr. 31, 52). Soon thereafter, Lowater drove up and delivered Crowe's message to Savage (Tr. 32, 54). A minute or two later, Coghlin and Conley returned. Coghlin jumped out of his station wagon and asked Savage if he had heard the conversation on the radio-telephone between Crowe and Lowater. Savage said, "No, why?" Coghlin replied that Crowe was giving orders for Savage to get over to Site C. Savage said that he had not heard the conversation because his radio was off. Coghlin said, "Who does he think he is, the foreman? He can't give orders around here. I will get his check" (R. 25; Tr. 32, 54).

Coghlin and Conley then departed for Amco's office in Altadena, about 18 miles away (Tr. 84). At the same time, Lowater and Savage, in separate trucks, set out for Site C (Tr. 33, 95). Enroute to Site C, Savage heard Coghlin attempt to call Foreman Cassidy at Site C without success. Savage volunteered to give a message to Cassidy. Coghlin told him to pick up Crowe's time record from Cassidy and bring it to Amco's office (Tr. 33). Lowater, upon his arrival at Site C, encountered Crowe and advised him that he was about to be discharged.

Crowe asked the reason. Lowater replied, "Because you used a radio to call for the steward" (Tr. 13, 92-93).[7] Crowe went up to the surface, sought out Foreman Cassidy and asked Cassidy whether he was discharged. Cassidy verified the discharge and told Crowe that it was because he had used the radio to call his steward (Tr. 13). Crowe then retrieved his tools; about a half hour later, he received his final check (Tr. 13).[8]

II. The Board's Conclusions and Order

On the foregoing facts, the Board found (R. 27), contrary to its Trial Examiner, that Amco discharged Crowe because he sought to summon Steward Savage to Site C to represent the Union in the dispute with the Ironworkers over the installation of a fan.[9] Since Crowe's action was protected by Section 7 of the Act, the Board concluded (R. 27) that his discharge violated Section 8(a)(3) and (1) of the Act.

The Board's order (R. 28) directs Amco to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order

[7] Amco, at that time had no rule against employees using the radio (R. 12; Tr. 78).

[8] After telling Crowe about his discharge, Lowater borrowed two Amco employees from Foreman Cassidy and with their help installed the disputed fan in less than an hour (Tr. 96).

[9] The Trial Examiner found that Crowe was discharged for summoning Lowater to Site C. We show *infra* that the Board was justified in overruling the Trial Examiner's conclusion.

requires Amco to reinstate Crowe, to make him whole for any wages lost by reason of his wrongful discharge and to post the usual notice.

ARGUMENT

Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That Amco Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Crowe Because He Engaged in Union Activity Protected by Section 7 of the Act

The law is well settled that an employee with a complaint about his working conditions who presents his grievance to management through prescribed procedures is engaged in activity protected by Section 7 of the Act. *N.L.R.B.* v. *Thor Power Tool Co.*, No. 14,972, decided October 8, 1965, 60 LRRM 2237 (C.A. 7); *N.L.R.B.* v. *Bowman Transportation Co.*, 314 F. 2d 497 (C.A. 5), enforcing 134 NLRB 1419; *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F. 2d 835 (C.A. 7); and see *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 39-40.

The collective bargaining contract (Article II, Section 13) in this case provided for the appointment by the Union of a steward who "shall see that working conditions of this agreement are observed" (R. Exh. 1, p. 9). Another Section (Article I, Section 5) provided that "all grievances or questions in dispute" were to be adjusted by the representatives of the parties to the agreement, i.e., union stewards or other officials and their managerial counterparts. The Board found that Crowe was discharged for trying to communicate during working hours with his steward,

who was at a different job site, to notify him of a threatened jurisdictional dispute resulting from the performance by Ironworkers of work which Crowe thought should rightfully be performed by members of his Union (R. 27). If, as we show below, this factual finding is supported by substantial evidence, there is no question but that Crowe's discharge was unlawful under Section 8(a)(3).[10] See cases cited *supra*, p. 7.

There is no dispute that Amco officials Coghlin and Conley decided to discharge Crowe immediately after they overheard his radio-telephone conversation with Lowater about the jurisdictional problem at Site C. The basic issue of fact in the case is precisely what Coghlin and Conley heard that caused them to discharge Crowe. Amco Vice President Coghlin was Amco's sole witness. Coghlin testified that he heard no request by Crowe that Lowater send Steward Savage to Site C—only a request that Lowater come to Site C himself. According to Coghlin, he decided to discharge Crowe because these "orders" to Lowater, a foreman, allegedly violated Article III, Section II of the agreement which provided that "On jobs having a Foreman, workmen are not to take directions or orders or accept the layout of any job from anyone except the Foreman" (Tr. 72-73, 74, 75, 78, 80-81, R.

[10] The discharge was equally violative, of course, of the provision of Article II, Section 13, of the bargaining agreement which was declarative of the federal labor law, and stated that an employee should not be discharged or otherwise discriminated against for lodging a complaint or giving evidence with respect to an alleged violation of the bargaining agreement.

Exh. 1, p. 9). However, the evidence amply supports the Board's finding that Crowe asked Lowater to apprise Savage of the situation at Site C and to urge Savage to go there, that Coghlin and Conley heard this message, and that they discharged Crowe because of it.

As the record shows, Crowe's testimony (Tr. 10, 13, 20) that he asked Lowater to tell Savage about the jurisdictional problem at Site C and to urge Savage to go there was fully corroborated by the testimony of three other witnesses—Lowater, Savage and Union Business Manager Milne. Thus, Foreman Lowater testified that he received this message for Steward Savage and promptly transmitted it to him at Site 23 (Tr. 91).[11] That such a message was received by Savage, is evidenced, of course, by the fact that he promptly proceeded to Site C.[12] As for Savage and Milne, though neither overheard Crowe's conversation with Lowater because their radio was off, both confirmed Lowater's testimony that he delivered Crowe's message to Savage at Site 23 just prior to the return of Amco officials Coghlin and Conley (Tr. 32, 54).

The evidence is equally strong that it was Crowe's efforts to get Savage to Site C, overheard by Coghlin and Conley, that aroused their anger. Thus, both Savage and Milne testified that when Coghlin and

[11] When he gave this testimony, Lowater was still in Amco's employ (Tr. 90).

[12] Amco errs in its assertion (Br. p. 15) that Savage did not go to Site C after Crowe requested his presence. The uncontradicted testimony of Savage shows that he did proceed to Site C (Tr. 33).

Conley returned to Site 23 immediately after Lowater had delivered Crowe's message to Savage, Coghlin's complaint was that Crowe was giving orders over the radio for *Savage* to come to Site C (supra, p. 5). Further, when Lowater apprised Crowe of his discharge, having overheard the conversation between Coghlin and Savage as Lowater was driving to Site C, Lowater told Crowe that he reason was, "Because you used a radio to call for the steward" (Tr. 13). Finally, according to Crowe's uncontradicted testimony, his foreman, Cassidy, told him he was fired because he used the radio *to call Steward Savage* (*supra*, p. 5).[13] In view of the foregoing evidence, the Board was clearly warranted in finding that the "reason for [Crowe's] discharge was his conduct in trying to communicate during working hours with his steward, who was at a different work site" (R. 27).

The Board's conclusion is not impaired by certain testimony of Foreman Lowater to which Amco attributes great weight. Under cross-examination by his employer's counsel, Lowater testified that it was "possible" that Crowe had told him to come to Site C as well as to notify Savage of the problem there (Tr. 94). Thereafter, when asked to state once more what Crowe had said, Lowater replied, "Well, I don't recall the exact words that he used, but it was more for me to get hold of Doc Savage and to come over to Charley Site; the Ironworkers were doing our work"

[13] Amco did not call on Cassidy to testify.

(Tr. 95).[14] This testimony indicates, at most, that Coghlin heard Crowe attempt to recruit Lowater, as well as Savage, to deal with the jurisdictional problem at Site C. It does not affect the Board's finding that it was Crowe's effort to bring over *Savage*, not *Lowater*, which caused Coghlin to have him discharged. As shown *supra*, that finding rests firmly on the testimony of union officials Savage and Milne that Coghlin complained to them only about Crowe's efforts to reach Savage, as well as the corroborating testimony of Crowe and Lowater. Moreover, even if Crowe asked Lowater, as well as Savage, to come to Site C, and the request for Lowater's presence played some part in Amco's decision to discharge Crowe, Amco's action was still unlawful since Crowe's efforts to summon Savage was, on the record here, "at least a contributing cause of his discharge." *Cupples Co. Mfrs.* v. *N.L.R.B.*, 106 F. 2d 100, 117 (C.A. 8); *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 985 (C.A. 7), certiorari denied, 320 U.S. 789; *N.L.R.B.* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8).

Nor is the Board's finding as to the reason for Crowe's discharge impaired by the fact that the Board declined to follow the Trial Examiner in cred-

[14]In view of Lowater's failure to mention a request to come over to Site C himself in his earlier testimony (Tr. 91), he may well be mistaken here. Earlier, he testified that he had told Crowe "I will be right over" (Tr. 91), but he made it clear that he went to Site C "because of [his] prior orders" from the general contractor (Tr. 93).

iting Coghlin's claim that he discharged Crowe only because Crowe asked Lowater to come to Site C. It is well settled that the Board may, as it did here, disregard the findings of a Trial Examiner where he credits testimony which "conflicts with well supported and obvious inferences from the rest of the record." *N.L.R.B.* v. *Pyne Molding Co.*, 226 F. 2d 818, 819 (C.A. 2). Accord: *N.L.R.B.* v. *Waterfront Employers*, 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686 (C.A. 9); *N.L.R.B.* v. *Jackson Maintenance Corp.*, 283 F. 2d 569, 570 (C.A. 2); *N.L.R.B.* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 174 (C.A. 8). This is particularly true where, as with Coghlin's testimony, "the testimony in question is given by an interested witness and relates to his own motives." *N.L.R.B.* v. *Pyne Molding Corp., supra.*

Amco also errs in contending (Br. pp. 13-16) that the Trial Examiner's preference for Coghlin's testimony over Crowe's was founded on demeanor evidence which was not available to the Board. It is clear from the Trial Examiner's decision, that his distrust of Crowe's testimony was based upon his analysis of the record which the Board deemed not unreasonable, but less tenable than its own analysis of the record. Thus, the Trial Examiner's suggestion (R. 11) that Crowe had little real interest in getting in touch with Savage failed, in the Board's view to give adequate weight to the evidence, discussed above, that Lowater, after talking to Crowe, immediately sought Savage and advised him of the situation at Site C. Again, the Trial Examiner's finding (R. 11) that Savage did little or

nothing when he arrived at Site C, from which the Trial Examiner infers a lack of interest on Crowe's part in having Savage there, discounts the fact that Lowater preceded Savage to Site C and promptly performed the disputed work in accordance with instructions which he had received earlier that day (Tr. 93, 96). Finally, the Trial Examiner erroneously attributed to Crowe testimony that Lowater was only 3 to 5 miles away when Crowe reached him by radio (R. 12). This was a further reason for discounting Crowe's testimony, in the Trial Examiner's view (R. 12). However, Crowe testified that *Site D*, where Steward Savage was usually to be found,—not Site 23,—was 3 to 5 miles from Site C (Tr. 14). The distance between Site C and *Site 23*, where Crowe located Lowater, both Crowe and Savage estimated as being 8 to 10 miles (Tr. 22, 34).

Amco in its brief to the Court (pp. 12-13) for the first time argues that if it is not sustained in its claim that it discharged Crowe for directing Lowater to come to Site C, an alternative reason for which it *might* have discharged Crowe was that he "ordered Lowater, a foreman, to locate Savage and tell Savage to come over to Site 'C'." This argument is unavailing to Amco, however, for it is inconsistent with the assertion of Coghlin, which Amco relied on throughout the proceeding before the Board, that the decision to discharge Crowe was based solely on his summoning Lowater to Site "C". Coghlin expressly denied that he heard Crowe request Savage's presence at Site C (Tr. 80-81, see also Coghlin's testimony at Tr. 72-73, 74, 75, 78). The defense that Amco now seeks to

raise, therefore, is plainly a belated effort to evade the key factual issue in the case, and to salvage a position which has been disproved by the evidence. But Amco must stand or fall on the reason it has already advanced and the record it has already made as to the explanation for Crowe's discharge. It cannot simply introduce as an afterthought at this stage of the proceeding an alternative reason and assert in effect that if the first reason does not bear scrutiny, this new justification which has just been thought of should be considered. Rejection out of hand must obviously be made of the alternative reason proffered in such circumstances. A Board proceeding in a case involving alleged discrimination is not a guessing game, but rather involves a search for the true reason underlying the action complained of. When the reason advanced by a party proves false, the inference that the action was unlawfully motivated is thereby strengthened. When as here, an alternative and inconsistent reason is then offered, not only is it unworthy of consideration, but it further augments the inference of illegality. *N.L.R.B.* v. *Dant and Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), and cases cited, certiorari denied 348 U.S. 833; *N.L.R.B.* v. *Georgia Rug Mill*, 308 F. 2d 89, 91 (C.A. 5).

Amco also argues, in effect, that even if, as the Board found, Crowe did ask for Savage's presence at Site "C," the request amounted to an "order" to Lowater and therefore violated Article III, Section 11 of the bargaining agreement, which provides that on

jobs with a foreman, workmen are not to take orders from anyone except the foreman. Aside from the fact that this assertion is inconsistent with Coghlin's claim that Crowe did not even mention Savage in his communication with Lowater, the suggestion that Crowe "ordered" Lowater to act, and that Crowe thereby violated the agreement is plainly baseless. When Crowe requested Lowater to convey the message to Savage, Crowe did not "order" Lowater to do anything. An "order" is a "command" or "direction," and Crowe's communication to Lowater plainly did not convey the mandatory obligation that an "order" normally implies. This fact is made more obvious in light of the employee-foreman relation between the two. Crowe's choice of language over the radio-telephone, or even his tone of voice may not have been the most exemplary and may even have been unwise. However, the courts have recognized that an employer may not sit in absolute judgment on the propriety of all remarks made by his employees in the course of protected activity. If such were the case, an employee would hesitate to play an active role in union activity, since he would be "wholly at the mercy of the varied understanding of his hearers and, consequently, of whatever inferences may be drawn as to his intent and meaning." *Thomas* v. *Collins*, 323 U.S. 516, 535. Accord: *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21. Thus, "[t]he employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Initially, the responsibility to draw the line between

these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *N.L.R.B.* v. *Thor Power Tool Co., supra,* decided October 8, 1965, (C.A. 7), citing, *N.L.R.B.* v. *Illinois Tool Works,* 153 F. 2d 811, 815-816 (C.A. 7). And see *Walls Mfg. Co.* v. *N.L.R.B.* 321 F. 2d 753 (C.A.D.C.), certiorari denied, 375 U.S. 923.

There is another reason why there is no merit to Amco's suggestion that Crowe violated Article III, Section 11, of the bargaining agreement. In addition to the fact that Crowe's message to Lowater was not an "order" in the accepted sense of the word, the incident plainly does not present the type of situation contemplated by that contract provision. Section 11, in the context in which it appears (see Article III, Section 10, which precedes it) obviously is intended to establish the chain of command on the job, and does not purport to be a regulation of employee conduct. Furthermore, Section 11 by its terms, is not a prohibition on employees *giving* orders. Accordingly, as the Board pointed out, "There would be no violation of this provision by Crowe even if . . . Crowe, an employee, was giving directions or orders to Lowater, a foreman" (R. 26).

In sum, we submit that on the basis of the foregoing considerations, the Board reasonably concluded that in view of the impact of the jurisdictional conflict with the Ironworkers on the work to be performed by Crowe and his fellow Electricians, Crowe, "in attempting in the manner and under the circumstances herein to reach his steward, was engaging in

a union or protected concerted activity. His discharge for such conduct was, therefore, violative of Section 8(a)(3) and (1) of the Act." [15]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

October 1965.

[15] The discharge of an employee for engaging in union activity has the "natural consequence" of discouraging such activity. Accordingly, contrary to Amco's assertion (Br. pp. 7-11), proof of the employer's motive in circumstances such as those presented on this record is unnecessary. *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 44-45; *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 227. Accord: *Pittsburgh-Des Moines Steel Co.* v. *N.L.R.B.* 284 F. 2d 74, 83 (C.A. 9).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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NO. 20157

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMCO ELECTRIC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF

PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD

FILED

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NO. 20157

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Respondent.

PETITIONER'S OPENING BRIEF

PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD

MILLIKAN, MONTGOMERY,
FRANCISCUS and OLAFSON

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NO. 20157

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMCO ELECTRIC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF

On May 24, 1965, the National Labor Relations Board entered a decision and Order in its Case Number 21-CA-6024 against the above named Petitioner arising out of an alleged unfair labor practice in violation of 29 U. S. C., Section 158(a)(1) and Section 158(a)(3), which allegations were contained in a Complaint filed against Petitioner.

The Petitioner, as an aggrieved person, invokes the jurisdiction of this Court to deny enforcement of the Board's Order or vacate or set aside or remand or modify that Order under the authority of Section 10(f) of that Act, 29 U. S. C., Section 160(f).

The acts out of which this case arose occurred at Vandenberg Air Force Base, California, where Petitioner was engaged as

an electrical subcontractor and was engaged, as found by both the trial examiner and Board, in interstate commerce subject to the Act.

QUESTION PRESENTED

The sole question presented by this petition is, was the Petitioner's discharge of Donald Crowe an unfair labor practice?

STATEMENT OF FACTS

Amco Electric, Petitioner, is a California corporation with its main offices located in Altadena, California. During the time in question Petitioner was engaged in performing electrical work in connection with the missile installation at Vandenberg Air Force Base as a subcontractor.

Donald Crowe, the alleged discriminatee, commenced work for Petitioner as an electrician on April 27, 1964. About one month later he and four others quit work to protest the reclassification of a fellow employee. Through the intercession of David G. Milne, business agent for the local IBEW, the five men were permitted to return to work the next day (Rep. Tr. p. 6, line 4 to p. 7, line 14).

On June 19, Crow, who was working at "C" site (at Vandenberg), came up from the underground capsule to get some materials and observed two iron workers "doing electrician's work" (Rep. Tr. p. 9). Crowe asked the workers to cease until he could call his

steward to talk to them. Crowe then went over and used a radio on a truck parked nearby. What he did next is a subject of flat contradiction in the testimony. Crowe testified that he first attempted to contact Savage, his union steward, and only after he could not locate Savage did he attempt to call Frank Lowater, a foreman (Rep. Tr. p. 10). The testimony of Norman H. Coghlin, vice president and field superintendent of Petitioner, directly contradicts this. Mr. Coghlin testified (Rep. Tr. p. 72) that he had the radio on during all times mentioned and the only call from Crowe he heard, was Crowe calling Lowater. He never heard any call from Crowe to Savage. Mr. Lowater, a witness for the general counsel, also had his radio on and he testified that the first he heard from Crowe was Crowe calling him (Rep. Tr. p. 91). No other witness testified to having a radio on. This conflict in testimony was resolved by the trial examiner against Crow's version.

In any event, Crowe called Lowater and talked to him about something. Again we have a flat contradiction in testimony. Crowe testified (Rep. Tr. p. 13) that he asked Lowater if he knew where Savage was and asked him to relay a message to Savage that the Iron Workers were moving fans, electrician's work, and that Savage should come over to "C" site. Coghlin testified (Rep. Tr. p. 73) that the substance of this conversation was that Lowater should immediately leave where he was and come over to "C" site as "the iron workers were doing our work". Lowater was the foreman of the crew that would move fans if they were moved by electricians. Lowater's testimony on this conversation was that Crowe

told him to get Savage over to "C" site (Rep. Tr. p. 91). He then stated that he replied, "10-4, I will be right over" (Rep. Tr. p. 93). On cross examination, Mr. Lowater was asked that if it was possible, in light of his definitely recalled response to Crowe, that Crowe had told him, Lowater, to come over to "C" site. Lowater admitted that this was possible. He then testified that Crowe told him to get Savage to "C" site and also for Lowater to go to "C" site. Thus, we have another direct conflict in testimony, one that cannot be resolved by making different inferences, but could be resolved only upon the witnesses' demeanor and the trial examiner's evaluation of their credibility. This direct conflict was resolved in favor of the conversation supported by both Coghlin and Lowater that Crowe had told Lowater to come over to "C" site.

Because of the above order to Lowater, Crowe was fired. He filed a grievance with his union. His discharge was brought up for discussion by the Union at a joint conference committee of employers and employees, but no action on it was taken by the committee (Rep. Tr. p. 53).

Crowe then filed charges against Petitioner with the NLRB (Clk. Tr. p. 3). A complaint and notice of hearing was issued by general counsel (Clk. Tr. p. 4) and Petitioner filed its answer (Clk. Tr. p. 7). The hearing was held on October 13, 1964 (Rep. Tr. pp. 1-100) and on January 19, 1965 the trial examiner issued his decision (Clk. Tr. p. 9). General counsel filed exceptions (Clk. Tr. p. 17) and on May 24, 1965, the Board issued its decision (Clk. Tr. p. 22). Petitioner filed its petition to set aside the order of the

National Labor Relations Board (Clk. Tr. p. 32) and the Board filed its answer and cross-petition (Clk.Tr. p. 38).

SPECIFICATION OF ERROR

1. Certain material findings of fact upon which the Board predicted its Order are erroneous because they are contrary to the evidence in the record considered as a whole and said findings are unlawful because they are not supported by substantial evidence upon the record considered as a whole.

2. There is no support either in fact or in law for conclusion of Board that trial examiner resolved conflicts in relevant testimony only upon evaluation of conflicting inferences and conclusions and without regard to demeanor of witnesses.

3. The conclusion of law by the Board that certain conduct was not in violation of the collective bargaining agreement is arbitrary and capricious and not in accordance with the law.

4. That the conclusion of the Board that their findings of fact supported a violation of Act 8(a) 3 and 1 of the Act is arbitrary, capricious and not in accordance with the law.

5. That the conclusions of fact made by the Board are erroneous as a matter of law in that they are not supported by substantial evidence on the whole record.

SUMMARY OF ARGUMENTS

I

To sustain a violation of Section 8(a) (1) or (3) substantial evidence must be present showing that the true purpose or real motive of the employer in taking the action complained of was to encourage or discourage Union membership or discourage the utilization of rights guaranteed under Section 7 of the Act and as there was not substantial evidence tending to show the above, the decision of the National Labor Relations Board finding such violation cannot be sustained.

II

The facts as erroneously found by the National Relations Board clearly show that Crowe was fired for a valid business reason and not otherwise and that therefore the decision of the Board should not be enforced.

III

The questions of credibility resolved by the trial examiner who observed the demeanor of the witnesses should not be reversed by the Board unless the testimony given credence to is hopelessly or inherently incredible and, therefore, the finding of the trial examiner that Crowe called Lowater and ordered him to come over to "C" site, must be sustained.

ARGUMENT

I

TO SUSTAIN A VIOLATION OF SECTION 8(a), (1) or (3) SUBSTANTIAL EVIDENCE MUST BE PRESENT SHOWING THAT THE TRUE PURPOSE OR REAL MOTIVE OF THE EMPLOYER IN TAKING THE ACTION COMPLAINED OF WAS TO ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP OR DISCOURAGE THE UTILIZATION OF RIGHTS GUARANTEED UNDER SECTION 7 OF THE ACT AND AS THERE WAS NOT SUBSTANTIAL EVIDENCE TENDING TO SHOW THE ABOVE, THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD FINDING SUCH VIOLATION CANNOT BE SUSTAINED.

The crux of a violation of Section 8(a), (1) or (3) is the true purpose or real motive of the employer in taking the action complained of. NLRB v. Jones & Laughlin Steel Corporation (1937), 301 U.S. 1, pages 45 through 46; Associated Press v. NLRB (1937), 301 U.S. 103; Radio Officers' Union, etc. v. NLRB (1954), 347 U.S. 17. Therefore, there must be substantial evidence supporting the theory that the employer's real motive was one prohibited by Section 8(a), (1) or (3) to sustain a violation of the Act.

Even taking the facts as found by the National Labor Relations Board as true, they clearly do not support a violation of either Section. The Board in its decision apparently took the position that its finding (despite a contrary finding by the trial examiner) that Crowe attempted to call Savage, his union steward, and after failing to locate him called Frank Lowater, a foreman, to have him tell Savage to come over to site "C", automatically established the required intent or motive necessary to sustain a

violation of either Section 8(a), (1) or (3).

While the record of the Board's decision does not contain a citation of any authorities to support the conclusions drawn, it would appear that they must have relied heavily upon the Radio Officers' Union case. Radio Officers' Union, etc. v. NLRB (1954), 347 U.S. 17, pages 42 through 44.

Prior to the Radio Officers' Union case, evidence of the surrounding circumstances was necessary in order to establish a violation of either Section 8(a), (1) or (3). If evidence of the surrounding circumstances supported the premise that the act was done with the requisite intent or motive and such evidence was substantial, in light of the whole record, then and only then could a violation be established. The Radio Officers' Union case established a different rule in a very limited number of cases. Two elements were necessary to invoke the rule: (1) the natural and foreseeable consequence of the employer's act or action must have been to encourage or discourage union membership or in some manner to discourage the exercise of the rights granted under Section 7 of the Act, and (2) the designation must solely (emphasis added) be based upon the criteria of union membership. If both elements are present, then the case alleging a violation of either 8(a), (1) or (3) of the Act is made and an employer's protestation that he did not intend to encourage or discourage union membership or rights granted under Section 7 of the Act must be regarded as irrelevant as a party must be determined to have intended the natural consequences of his action. Radio Officers' Union, etc. v NLRB (1954), 347 U.S. 17, at page

45. In the Radio Officers' Union case the criteria based solely upon union membership was that union and non-union workers were paid a different rate. The Court decided that such difference in pay would have a natural and foreseeable result to encourage or discourage union membership and that the criteria was based solely upon union membership and that, therefore, the alleged discrimination violation of the Act had been proved. The Board asked the Ninth Circuit to extend the rationale of the Radio Officers' Union case in the case of Pittsburgh Des Moines Steel Company v. NLRB (1960, 9th Circuit), 284 F. 2d 74. In that case the evidence was that the company had in accordance with a long established program, utilized five factors to determine the eligibility of particular company plants for Christmas bonuses. In the utilization of these factors it was apparent that a particular plant that had a protracted strike during the year would naturally be affected adversely by the criteria. The Board decided that since the utilization of these factors would adversely affect the strikers that the rule of the Radio Officers' Union case should be applied and that no further evidence of discrimination other than the bare act itself need be proved. The Court decided, however, that the rule of the Radio Officers' Union case applied only (emphasis added) where the factor used was union membership. The fact that the factor used would naturally apply more readily to unions or to union membership was held immaterial and accordingly refused to extend the doctrine of Radio Officers' Union. As there was little or no additional evidence brought forth to establish unlawful motive or intent to use these factors discriminatorily, the Court

decided there had been no violation of Section 8(a), (1) or (3).

In the instant case not even the Board suggested that Crowe was fired because of union membership. Rather all conceded that he was fired for taking some particular action. Counsel for the General Counsel contended, however, that the real motive behind the firing for this particular action, was because of anti-union bias on the part of Petitioner's management, but there was no evidence offered of anti-union bias unless the Radio Officers' Union case rule applies and Crowe's firing proves the bias.

As it is apparent that under the circumstances the action taken by Petitioner does not come within the doctrine of the Radio Officers' Union case, the violation is not proved unless there is circumstantial evidence in the record tending to establish that the motive or true intent of Petitioner's officers in firing Crowe was discrimination. It is significant in this respect to note that the Board in its findings of fact made no findings regarding either anti-union bias in general of Petitioner or anti-union bias against Crowe in particular because of any past protected activities. The only evidence alluded to at all pertaining in any way to this was the fact that about a month prior to the final termination of Crowe, Crowe and four others quit work because of what Crowe states (Rep. Tr. p. 5) was the firing of an electrical welder or what was stated by David G. Milne, Business Representative for the International Brotherhood of Electrical Workers (Rep.Tr. p. 56) to be a reclassification. After that the men who quit were rehired. It is submitted that this evidence is hardly substantial evidence from which to find

any improper motive on behalf of Petitioner in firing Crowe, and no such finding was made or could properly be made.

Since there was no substantial evidence showing that the true purpose or real motive of the employer was unlawful, no violation, therefore, was proven.

II

THE FACTS AS ERRONEOUSLY FOUND BY THE NATIONAL RELATIONS BOARD CLEARLY SHOW THAT CROWE WAS FIRED FOR A VALID BUSINESS REASON AND NOT OTHERWISE AND THAT THEREFORE THE DECISION OF THE BOARD SHOULD NOT BE ENFORCED.

The provisions of the Collective Bargaining Agreement between Petitioner and IBEW at the time in question are as follows:

ARTICLE I

Section 5. In the event of a dispute or where trouble arises on any job where workmen are employed under the terms of this Agreement, they shall remain on the job at work. All grievances or questions in dispute shall be adjusted by the duly authorized representatives of both parties to this Agreement

ARTICLE III

Section 10. No Foreman of one job shall at the same time perform work or supervise work on another job. . . .

Section 11. On jobs having a Foreman, workmen are not to take directions or orders or accept the layout of any job from anyone except the Foreman. This does not deny the Employer or his representative the right to give directions, orders, or layout through the proper channels.

Crowe testified that he was familiar with the above rules (Rep.Tr. pp. 23 and 24) and giving his testimony full effect, as did the Board, but not the Trial Examiner, it was that he first attempted to locate Savage, the union steward, and failing this called Lowater, a foreman, and told him to tell Savage to come over to site "C". It is apparent from the reading of the indicated Articles and Sections that workmen are not to give orders to foremen and the Board itself seems to indicate that if Crowe told Lowater to come over to site "C", this would be a valid business reason for the discharge and the firing would have accordingly been proper. This is in accordance with Board decisions holding that a person was properly discharged when leaving his production line to present grievances without notifying a foreman or fellow workers when required by plant rules to do so. D. W. Terry dba Terry Poultry Company (1954), 109 NLRB 1097. It is difficult to understand why a clear order to a foreman directing the foreman to notify the shop steward that "someone over there was doing our work" would not be violative of company discipline, if an order to the foreman to come to "C" site would be such a violation. The fact that the discipline was also

a matter covered by the Collective Bargaining Agreement merely adds additional weight to the conclusion that the discharge was for a proper business reason. In any event, the evidence is not disputed that Norm Coghlin, vice president and field superintendent of Amco at Vandenberg, was unquestionably irritated at Crowe because of his radio conversation with Lowater. Depending on the version of Crowe's conversation which is believed, Coghlin was irritated at Crowe either because Crowe had ordered Lowater, a foreman, to come over to site "C", or because Crowe had ordered Lowater, a foreman, to locate Savage and tell Savage to come over to site "C". It is respectfully submitted that whichever version of what Crowe said is believed, an order to a supervisory employee was made and the evidence is clear and settled that it was this order which caused Crowe to be fired.

III

THE QUESTIONS OF CREDIBILITY RESOLVED BY THE TRIAL EXAMINER WHO OBSERVED THE DEMEANOR OF THE WITNESSES SHOULD NOT BE REVERSED BY THE BOARD UNLESS THE TESTIMONY GIVEN CREDENCE TO IS HOPELESSLY OR INHERENTLY INCREDIBLE AND, THEREFORE, THE FINDING OF THE TRIAL EXAMINER THAT CROWE CALLED LOWATER AND ORDERED HIM TO COME OVER TO "C" SITE MUST BE SUSTAINED.

Questions of credibility are for the trial examiner who has the opportunity to observe the demeanor of the witnesses NLRB v. West Coast Casket Co., Inc. (1953, 9th Circuit),

205 F. 2d 902, 906; Universal Camera Corp. v. NLRB (1951), 340 U. S. 474, page 488; NLRB v. San Diego Gas and Electric Co. (1953, 9th Circuit), 205 F. 2d 471, at page 475; NLRB v. Swinerton (1953, 9th Circuit), 202 F. 2d 511, 514, cert. den. 344 U. S. 814.

The trial examiner's valuation of oral evidence will not be disturbed unless the testimony which he credits is hopelessly or inherently incredible.

NLRB v. Steel, Metals and Hardware Fabricators etc. Local, Local 810 (1960, 2nd Circuit), 274 F. 2d 688; NLRB v. Davisson (1955, 9th Circuit), 221 F. 2d 802; NLRB v. Dominion Oil Co. (1952, 2nd Circuit), 201 F. 2d 484, 490. As was stated by the 9th Circuit in Pittsburgh DesMoines Steel Co. v. NLRB (1960, 9th Circuit), 284 F. 2d 274, "We are not reluctant to insist that an examiner's finding on veracity must not be overruled without a very substantial preponderance in the testimony as recorded, NLRB v. Universal Camera (1951, 2nd Circuit), nor should the Board be permitted either to draw unwarranted inferences to reverse a finding of credibility made by the trial examiner or to discard positive findings of credence of favor of inference drawn from tenuous circumstances".

NLRB v. Pyne Molding Co. (1955, 2nd Circuit), 226 F. 2d 818, 819; Boeing Airplane Co. v. NLRB (1954, 9th Circuit), 217 F. 2d 369, 376. In the instant case the trial examiner made a specific finding that his findings of fact were based "upon consideration of the entire record, the demeanor of the witnesses, and briefs filed by general counsel and respondent". Here there was a head-on

conflict in testimony between that given by Crowe and between the testimony of the other witnesses. Crow testified that he first attempted to call Savage, his job steward. That it was only when he was unable to contact Savage that he called Lowater. The Trial Examiner found: "Crowe's claim that he attempted to contact Savage first is viewed as being not worthy of credence." The testimony of Lowater reflects that Crowe in fact did instruct or request him to come immediately to "C" site. The record is devoid of any evidence that Savage went to "C" site and this fact lends support to the proposition that Crowe was interested only in having Lowater, rather than Savage, come there, and his testimony that he was interested primarily in having Savage notified of the ironworkers' actions is immaterial, if it in fact occurred. Crowe did not work under the supervision of Lowater, but under the supervision of Foreman Raymond Cassidy. He was successful in making contact with Frank Lowater, on the radio telephone, who was approximately 18 miles away at another site. Lowater was the man whose crew did the categories or work Crowe wanted done.

Further, not one of the witnesses who had their radio sets on, recalled hearing Crowe in his alleged attempt to get in touch with Savage. Lowater's testimony (a witness of the general counsel and not of the petitioner) was, on direct, that Crowe asked him to contact Savage and that then he, Lowater, said "10-4, I will be right over" (Emphasis added). When Lowater was cross-examined on this, he was asked whether in light of the response he had given it was possible that Crowe, in addition to asking him to relay a

message to Savage, had also requested that he come over to "C" site. Lowater's response to this was he couldn't remember whether or not Crowe had asked him to come over, but that in light of his response which he knew he gave, he could have said that. Further, on redirect (Rep. Tr. p. 95), Lowater testified what his best recollection of Crowe's statement was, "Well, I don't recall the exact words that he used, but it was more for me to go get hold of Doc Savage and to come over to Charley's site" (Emphasis added).

Thus, Crowe, a person whose testimony the Trial Examiner, after observing him, stated was not worthy of credence, was the only one who testified that he called for Savage first and only then contacted Lowater and that he merely asked Lowater to relay a message. Lowater's testimony is consistent with the testimony given by the rest of the witnesses while it is to varying extents inconsistent with the testimony given by Crowe. It is submitted, therefore, that the decision of the National Labor Relations Board that Crowe merely attempted to get in touch with Savage, the Union steward, is not supported by substantial evidence and hence cannot be sustained.

CONCLUSION

It is respectfully submitted that on the basis of the findings of credibility by the trial examiner and on the basis of substantial evidence in the record it must be concluded: (1) that there is no substantial evidence showing that Crowe was discharged in violation

of either Section 8(a), (1) or (3); and (2) the evidence, even as erroneously found by the Board, and especially as found by the trial examiner, clearly establishes that Crowe was discharged for a lawful cause. Therefore, the intermediate and recommended order of the trial examiner should be affirmed and the decision and order of the National Labor Relations Board should be reversed.

Respectfully submitted,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ C. E. Millikan, Jr.
C. E. MILLIKAN, JR.

No. 20155

United States
Court of Appeals
for the Ninth Circuit

EDITH L. HIGLEY, Widow of
Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner
Fourteenth Compensation District
W. J. JONES & SONS, INC., and
NATIONAL AUTOMOBILE &
CASUALTY INSURANCE CO.

Appellees.

Upon appeal from the Judgment of the United States District Court for the District of Oregon

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COUNTERSTATEMENT OF THE CASE

In this action libelant below, appellant here, sought to have the District Court review and set aside as not in accordance with law a compensation order filed on August 13, 1964 by J. J. O'Leary, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 *et seq.* In that order, the deputy commissioner rejected the compensation claim (death benefits) of libelant, Edith L. Higley (hereinafter referred to as "claimant"), on the ground that the death of Darold B. Higley (hereinafter referred to as "employee" or "deceased employee") was due to advanced coronary disease unrelated to the particular work in which he was engaged at the time of his death. The libel alleged, in effect, that the employee's death was attributable to the strain of his work. However, the court below, upon review of the record, concluded that there was substantial evidence to support the deputy commissioner's compensation order in which it had been found, in effect, that death was due to natural causes. Accordingly, the District Court sustained that order by granting the deputy commissioner's motion for summary judgment and denying claimant's motion for such judgment. This appeal followed.

THE COMPENSATION ORDER

The compensation order complained of reads in pertinent part as follows:

> Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following
>
> ### FINDINGS OF FACT
>
> That on the 16th day of December, 1963, the deceased above named was in the employ of the employer above named at Longview, Washington, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by National Automobile and Casualty Insurance Company; that on said date the deceased was performing service as a longshoreman for the employer and engaged in loading logs aboard the vessel, SS SAPHO, which was afloat in the Columbia River; that he reported for work at 8:00 A.M. on said date and together with other longshoremen had been engaged in moving timbers by means of a peavey and was so engaged at approximately 3:30 P.M. when he suddenly collapsed and died shortly thereafter; that for approximately nine months previous to said date the deceased had been employed as a longshoreman and the work in which he was engaged on the date of his death was similar to and no more strenuous than the type of work in which he was customarily engaged; that the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the

coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for death benefits filed by Edith L. Higley as surviving wife of the deceased be, and it is hereby REJECTED for the following reason: the death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963.

QUESTION PRESENTED

The only question presented is whether the record, considered as a whole, supports the deputy commissioner's finding that the death of the employee was caused by the employee's advanced heart disease and not by his activities as a longshoreman.

SUMMARY OF ARGUMENT

The evidence in the record before the deputy commissioner, considered as a whole, supports his finding that the employee's death was the product of natural causes unrelated to the employment activities of the deceased as a longshoreman. Thus supported, the finding is to be accepted upon judicial review. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504

(1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

In the light of the medical evidence of record showing that the stress of the deceased's longshore work on the day of death (which, in character, was similar to what he had been performing for nine months prior thereto) had *not* been the cause thereof, the deputy commissioner's finding to the effect that death was the product of the natural progression of the deceased's existing heart disease cannot be said to be "irrational." *O'Keeffe v. Smith, Hinchman & Grylls*, 380 U.S. 359 (1965). Autopsy and medical evidence — including that offered by claimant herself—showed that the employee had suffered coronary occlusions prior to the work that day and that, at the time of the latest occlusion, there was an 80 to 90 percent closure of the employee's arteries. This evidence showed that death had not been produced by the employee's longshore activities.

ARGUMENT

The deputy commissioner's finding that the employee's death was not employment related is supported by substantial evidence in the record considered as a whole.

(a) Scope of Review

The scope of judicial review in cases such as the one at bar is set forth in *O'Leary v. Brown-Pacific-*

Maxon, Inc., 340 U.S. 504 (1951), in which the Supreme Court said:

> . . . The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456. *It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole . . .*
>
> * * * *
>
> *. . . We do not mean that the evidence compelled this inference;* we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion . . . (Emphasis supplied.)

Similarly with reference to the inferences drawn by a deputy commissioner, the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. *But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference* that an injury did or did not arise out of and in the course of employment *is conclusive. No reviewing court can then set aside that inference because of a belief that the one chosen by the Deputy Commissioner is factually questionable.*
>
> *. . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Dep-*

> *uty Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.* (Emphasis supplied.)

In short, where the deputy commissioner's compensation order has support of substantial record evidence it can be set aside only for an error of law, "such as a misconstruction of the Act." *Voris v. Eikel,* 346 U.S. 328 (1953).

And in language even more restrictive, the Supreme Court in *O'Keeffe v. Smith, Hinchman & Grylls, supra,* 380 U.S. 359 (1965) has added:

> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner, are to be accepted unless they are *irrational or* "unsupported by substantial evidences on the record as a whole." . . .
>
> * * * *
>
> We agree that the District Court correctly affirmed the finding of the Deputy Commissioner. While this Court may not have reached the same conclusion as the Deputy Commissioner, it cannot be said that his *holding* . . . is *irrational or* without substantial evidence on the record as a whole. (Emphasis supplied.)

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States, as well as by this Court (*Morrison-Knudsen Company, Inc. v. O'Leary,* 288 F.2d 542 (1961), cert. denied 368 U.S. 817; *Western Boat Building Co. v. O'Leary,* 198 F.2d 409 (1952); *Crescent Wharf & Warehouse*

Co. v. Cyr. 200 F.2d 633 (1952)), a court may not set aside a compensation order unless, on the whole record, the court believes that the deputy commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order under review.

Accordingly, logical deductions and inferences which are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable. *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Crescent Wharf & Warehouse Company v. Cyr,* 200 F.2d 633 (C.A. 9, 1952); *Liberty Mutual Ins. Co. v. Gray,* 137 F.2d 926 (C.A. 9, 1943); *Contractors PNAB v. Pillsbury,* 150 F.2d 310 (C.A. 9, 1945); *Lowe v. Central Ry. Co. of N.J.,* 113 F.2d 413 (C.A. 3, 1940); *Southern Stevedoring Co. v. Henderson,* 175 F.2d 863 (C.A. 5, (1949). Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed. *C. F. Lytle Co. v. Whipple,* 156 F.2d 155 (C.A. 9, 1946); *Liberty Mutual Insurance Co. v. Gray,* 137 F.2d 926 (C.A. 9, 1943); *Lowe v. Central R. Co. of New Jersey,* 113 F.2d 413 (C.A. 3, 1940); *Contractors PNAB v. Pillsbury* 150 F.2d 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940); *Parker v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Henderson v. Pate Stevedoring Co.,*

Inc., 134 F.2d 440 (C.A. 5, 1943); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson*, 168 F.2d 872 (C.A. 5, 1948).

The deputy commissioner's findings of fact are presumed to be correct, *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964 (C.A. 5, 1944); *Anderson v. Hoage*, 63 App. D.C. 169, 70 F.2d 773 (1934); *Pan American Airways v. Willard*, 99 F.Supp. 257 (N.Y. 1951); they are to be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Voris v. Eikel*, 346 U.S. 328 (1953); *Crescent Wharf & Warehouse Co. v. Cyr*, 200 F.2d 633 (C.A. 9, 1952); *United States Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951); *Walsh Stevedoring Co. v. Henderson*, 203 F.2d 501 (C.A. 5, 1953); *Gooding v. Willard*, 209 F.2d 913 (C.A. 2, 1954); *Charleston Shipyards v. Lawson*, 227 F.2d 110 (C.A. 4, 1955). The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of in the review proceeding. *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (C.A. 5, 1949); *Gulf Oil Corporation v. McManigal*, 49 F.Supp. 75 (W.Va. 1943); *Eastern S.S. Lines v. Monahan*, 26 F.Supp. 944 (Me. 1939); cf. *National Lead Co. v. Kingsland*, 74 F.Supp. 985 (D.C. 1948).

It is important to note in connection with the instant case wherein compensation was denied that judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award. In the former, affirmative evidence is not needed to support the denial of compensation; for upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. In other words, it is not necessary for the employer to prove a negative. *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954); *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880. The rejection follows the claimant's failure to establish his claim. In the *Gooding* case, the Court of Appeals said:

> We might let decision turn on the above, but it should also be noted that *the burden to show that the accident was a contributing cause of the death was on the appellee.* It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, *the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged.* The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show affirm-

atively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision it was error to set it aside. (Emphasis supplied.)

(b) The Evidence

At the hearing before the deputy commissioner on June 3, 1964, evidence offered by claimant showed the employee, a forty-three-year-old longshoreman, had, in the year prior to his death, fainted (T. 6-7, 8)[1] and had, at some uncertain time before, experienced shortness of breath (T. 8). Further, that on the day of death, the employee was, with co-workers, engaged in handling timbers on rollers and peaveys aboard a vessel (T. 14-15); that when he collapsed he was "peaveying the timbers into place" with three other men (T. 16); and that the work in which the deceased employee was engaged when he collapsed consisted of "rolling timbers" (T. 21). Medical testimony offered by claimant showed, by autopsy, that the employee had suffered "an occlusion, a thrombosis, of his right coronary artery" some "*seven days or perhaps twenty-eight days*" *prior to his death,* and, more recently, an occlusion of the left coronary artery and infarction of the heart muscle which had been present some "four to *twelve* hours" before (T. 24, 27-28). [Work on

[1] T. refers to the transcript of the proceedings before the deputy commissioner.

the day in question started at 8:00 a.m. (T. 22), and the collapse had occurred between 3:00 and 4:00 p.m. (T. 14), also according to claimant's evidence.] Claimant's medical witness estimated from the autopsy that the employee's arteries already had an 80 to 90 percent closure from natural process of disease prior to the more recent occlusion (T. 28-29). Another medical witness, whom claimant called, recognized that the employee had a longstanding atherosclerotic condition which had persisted for years and was not produced by his work (T. 34). Further, he admitted that the presence of myocardial infarction or damage to heart muscle (as found by claimant's other medical witnesses, *supra*) indicated that the last occlusion had occurred *some time prior to death* (T. 36). [This admission reflected adversely upon the witness' earlier testimony that he could not agree with the testimony of claimant's other medical witness who had stated this occlusion had taken place some hours before, rather than at the time of death (T. 34).]

In support of the employer's position that the employee's death was not employment related (T. 5), DR. KENNETH CLARK WILHELMI testified, in part and in effect, as follows: That he specializes in internal medicine, which includes diseases of the heart and blood vessels, cardiology (T. 37-38); that he had examined the pathology report of Dr. Buck (Dr. Charles Edward Buck who had testified on behalf of claimant T. 23 *et seq.,* and whose autopsy

report was attached as Exhibit No. 1 to the deposition of Dr. Leonard B. Rose, referred to hereinafter); that he had heard the testimony offered by claimant (T. 38); that, in the witness' opinion, the cause of claimant's death was "a final ultimate occlusion in the anterior descending branch of the left coronary artery superimposed upon previous occlusive disease of the right coronary artery as well as partial previous occlusion of the anterior descending branch" (T. 40); *that the work being performed by the employee at the time of death was not related to the occurrence which caused death* (T. 40-41); that the finding of a myocardial infarction (as testified to by Dr. Buck (T. 24), and as stated in Dr. Buck's autopsy report) implies that a segment of the employee's heart muscle had undergone death prior to the death of the employee; that at least *several hours must elapse,* during which the patient continues to live, *before such changes will show in the heart muscle* (T. 41); *that if a person should die immediately as the result of an abrupt occlusion there would not be found the heart muscle changes described in the employee's case* (T. 41-42); that the cause of the occlusion in the employee's case was *"simply the end result of progression of atherosclerotic disease process* which [the employee] had, no doubt, for a number of years"; that such statement is based upon the witness' experience with such cases and knowledge of (medical) literature; that the pathologist's report (Exhibit No. 1 to deposition) verifies the fact of "extensive atherosclero-

tic disease in all of the [employee's] coronary arteries, the aorta as well" (T. 42); that the report noted infarcted changes in the area of the heart muscle supplied by the right coronary artery, as well as more acute changes due to the final occlusion of the anterior descending branch of the left coronary artery; that, in other words, there were pathological changes of both long and short duration collectively (T. 42-43); that the foregoing opinion does not overlook the finding in the autopsy report of a hemorrhage; that such a fact is one of the "very common findings in a coronary artery occlusion"; that the witness knows of no studies which conclusively prove "subintimal or intimal beating [to be] actually due to a change in blood pressure per se"; that, instead, the atherosclerotic process is such that the vessel wall becomes friable, fragments easily and bleeds easily, which he has always considered to be a progressive part of this disease (T. 43); that the witness would not say in all cases it is safe to limit severely the activity of a man whose heart is bad but, instead, the advice has to be "individualized for each case" (T. 45); that he cannot say the employee, had he not worked the previous two weeks, would probably have survived the day of death, inasmuch as *there is "no evidence that implicates effort in the production of a coronary artery occlusion"; that it was "the natural progress of* [*the employee's*] *disease that caused the ultimate occlusion in the left coronary artery"* (T. 47); that how soon a person dies (from an occlusion) "depends upon the

point where the conductive mechanism of the heart is interfered with to the point where the heart no longer beats"; that "death is always sudden" (T. 48); *that the witness was unable to state that the employee's death was connected with his activities of pushing on timbers with a peavey*; that the witness believes that if the employee had stayed home in an oxygen tent all day on December 16, 1963, he nevertheless would have died in the same hour of the same day (T. 49); that the witness was of the opinion that *any increase in heart rate and blood pressure had nothing to do with the occlusion which caused the employee's death* (T. 50); that studies in cases of myocardial infarctions and deaths therefrom as a result of coronary artery occlusions show that "these things occur any time, anywhere, any place, and if a man works eight hours a day he has one-third chance of sustaining [such a happening] during those eight hours" (T. 50-51); that most of them actually occur while the persons are at complete rest or asleep (T. 50-51).

There was also received in evidence at the hearing before the deputy commissioner a July 17, 1964 deposition of Dr. Leonard B. Rose on behalf of the employer. The report of autopsy was attached to that deposition as an exhibit therein. However, although the deputy commissioner's motion for summary judgment had expressly recited that the deposition along with the transcript of the proceedings before the deputy

commissioner was attached to the motion, through inadvertence the deposition and its exhibit (which consitituted part of the record before the deputy commissioner) were omitted. By stipulation filed in this appeal it has been stated by counsel for the parties that the deposition (and necessarily its exhibit) is "cumulative." This thus corroborates the foregoing evidence that the employee had died as the result of his existing severe and advanced obstructive coronary disease, and not as the result of his work activities in rolling timber.

Based on the foregoing evidence, the deputy commissioner concluded that the employee's death was without relationship to his employment activities.

(c) Discussion

The deputy commissioner's task in the instant case was to decide from the record whether the employee's myocardial infarction and death therefrom were, as claimed, causally related to the work he was doing at the time of his collapse. It was for the deputy commissioner, as trier of the facts, to resolve conflicting evidence on this issue.

It should be noted, contrary to claimant's assertion on this appeal, that there was no rejection of the present claim by the deputy commissioner predicated upon any principle that strain —— even the non-extraordinary strain of a worker's usual activities — may not

be a basis for entitlement to compensation in a proper case. In short, the order here under review is *not based upon an absence of stress or strain,* ordinary or extraordinary. Instead it is based upon the existence of affirmative medical evidence showing that there was no relationship between the employee's death and his longshore activities on the day in question — activities which the deputy commissioner described in terms of strain to be of the same degree as deceased's work of the past nine months. This medical evidence, including testimony offered by claimant herself which the deputy commissioner, as trier of the facts, accepted, indicated that death was due to antecedent coronary occlusions unrelated to any work strain. Claimant has misconstrued and misapplied the findings of the deputy commissioner, and has sought to convert the compensation order into one holding that ordinary work strain may not be *a* basis for an award. Instead, the order merely finds that such strain was not the cause of death in this case. And the affirmative medical evidence supports this finding. Even claimant concedes in substance that if her construction were to fail, "it would be difficult to assert that the Deputy Commissioner's rejection order is wholly without support in the record." (Appellant's brief, pages 9-10.)

In determining the relationship of the employee's death to his work or, instead, to natural causes having no connection with his employment efforts, it was solely within the province of the deputy commissioner,

as trier of the facts, to pass upon the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability: *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880; *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954); *Wilson & Co. v. Locke,* 50 F.2d 81 (C.A. 2, 1931); *Hudnell v. O'Hearne,* 99 F.Supp. 954 (Md. 1951); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (C.A. 2, 1961); *Associated General Contractors v. Cardillo,* 70 App. D.C. 303, 106 F.2d 237 (1939). The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses: *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (C.A. 5, 1962); *John W. McGrath Corp. v. Hughes, supra,* 289 F.2d 403 (C.A. 2, 1961); *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954).

With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner: *Hampton Roads Stevedoring Corp. v. O'Hearne,* 184 F.2d 76 (C.A. 4, 1958); *Baltimore & O. R. Co. v. Clark,* 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia v. Norton,* 56 F.2d 287 (E.D. Pa. 1930); *Liberty Stevedoring Co. v. Cardillo,* 18 F.Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd. v. Marshall,* 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co.*

v. Norton, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall,* 57 F.Supp. 177 (Wash. 1944), aff'd 151 F.2d 1007 (C.A. 9, 1945); *Contractors PNAB v. Pillsbury,* 150 F.2d 310 (C.A. 9, 1945); *Crescent Wharf & Warehouse Co. v. Cyr,* 200 F.2d 633 (C.A. 9, 1952); *Marine Operators v. Barnhouse,* 61 F.Supp. 572 (Ill. 1944).

Nor is the deputy commissioner bound to accept the testimony of a claimant even when that testimony is uncontradicted. Thus, in *Kwasizur v. Cardillo,* 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880, the court stated:

> ... As for Kwasizur himself, it could hardly be claimed that the Deputy Commissioner was bound to accept the truth of the story, even though it were not contradicted, if it seemed to him, as the trier of facts, an improbable one. We think, therefore, if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a court.

As we have heretofore seen (under subtopic (a) of this "Argument"), rejection of a claim involves a different viewing of a case from one where a claim has been allowed. Unlike the latter type situation which requires the existence of affirmative evidence, the rejection requires none to support its denial which is warranted if a claimant has, in the opinion of the trier of the facts, failed to carry his burden of proof. *Gooding v. Willard,* 209 F.2d 913 (C.A. 2, 1954);

Kwasizur v. Cardillo, 175 F.2d 235 (C.A. 3, 1949), cert. denied 338 U.S. 880.

The record here contained ample evidence indicating that the myocardial infarction which resulted in the death of the employee was not causally related to his work activities. One of the employee's co-workers, called as a witness by claimant, testified that the employee had not complained of any pain or any unusual condition in the course of the day (T. 15), while another, similarly called by claimant, testified he had not noticed anything unusual about the employee and that "it was a half-way decent day and everyone seemed to be happy" (T. 20).

Moreover, the medical testimony offered by claimant was far from satisfactory in relating the period of the occlusion —— which caused the infarct — to a point in time when the employee was engaged in work for his employer. Indeed, in a way intended to represent accusation of the employer's counsel but actually reflecting adversely instead upon claimant, herself, the claimant significantly observes that Dr. Buck — *whom claimant had called as medical expert* — "was not asked to express an opinion as to whether or not the death was work-related." (Appellant's brief, page 4.) The medical evidence presented by the employer clearly refuted claimant's contention of relationship of death to work, accounting perhaps for claimant's failure to ask her own witness for an opinion on this all-important issue.

Certainly, it cannot be said that the deputy commissioner, as trier of the facts, was unwarranted in concluding from the existing record that claimant had not sustained the burden resting upon her to establish her claim. Nor can it be said that the evidence of record before the deputy commissioner "compelled" a finding that the employee's death was employment related within the meaning of the Longshoremen's Act. *O'Leary v. Brown-Pacific-Maxon, Inc. supra,* 340 U.S. 504 (1951), or that the deputy commissioner's finding was "irrational." *O'Keeffe v. Smith, Hinchman & Grylls, supra,* 380 U.S. 359 (1965).

Claimant has not only misconstrued the deputy commissioner's findings, as we have seen, but is laboring under a false impression that the filing of a claim raises, *per se,* a presumption of compensability. Thus, at page 12 of her brief it is stated that "[t]he applicable law which [the deputy commissioner] administers *presumes the claim to be compensable* 'in the absence of substantial evidence to the contrary.' " Reliance is placed upon Section 20(a) of the Longshoreman's Act, 33 U.S.C. 920(a).

First of all, were the contention valid, its efficacy was lost by the introduction of substantial evidence showing that death was the product of an antecedent coronary cause, unrelated (as claimed) to work activities. *Del Vecchio v. Bowers,* 296 U.S. 280, 285-287 (1935). With the introduction of evidence showing

that death was due to causes unconnected with the deceased's employment activities, "the presumption falls out of the case." *Ibid,* p. 286.

Secondly, although the section referred to raises a presumption that "the claim comes within the provisions of this Act" absent substantial evidence to the contrary, this provision relative to *coverage* (see Section 3(a), 33 U.S.C. 903(a), for the Act's coverage inclusions) does not create a presumption of *compensability,* as claimant asserts. In cases such as the present one there is no presumption of compensability arising from either the mere occurrence of an injury or the mere showing of disability or death, without more. It is essential for claimant to do more than present an application for payment. He must, instead, show to the satisfaction of the trier of the facts that disability or death, or both, are causally related to the injury. The presumption of Section 20(a) of the Longshoremen's Act, 33 U.S.C. 920(a), that a "claim" comes within the Act (upon which claimant here relies) requires some showing of the existence of facts supportive of a claim for compensation. There is no presumption in favor of compensability. *Hines v. Pacific Mills,* 214 S.C. 125, 51 S.E.2d 383 (1940). A claimant must still establish his claim of compensability. It is still the law that the burden is on him to prove the facts entitling him to an award of compensation, and this burden does not shift.

Numerous cases to this effect are cited under Key

Nos. 1339 and 1362, "Workmen's Compensation," American Digest System. A large number of the decisions on this point have gone to the extent of spelling out or specifying in detail the obligation on the part of claimants. In *Central E. & C. Co. v. Rossano,* 75 R. I. 108, 64 A.2d 197 (1949), it was stated that the mere showing of inability to work is insufficient to support a claim for compensation. Many of these decisions state in various ways that an award of compensation may not be made on the basis of conjecture or speculation and that the claimant must prove all factors or elements to a compensable claim: *Robertson v. North American Refractories,* 169 Md. 187, 181 A.223 (1935); *Conquy v. New Jersey P. & L. Co.,* 23 N.J. Super. 325, 93 A.2d 23 (1953); *Houle v. Tondreaux Bros. Co.,* (no State citation available) 91 A.2d 481 (Me. 1953); *Weirton Coal Co. v. Mishawake R. & W. Co.,* 119 Ind. 309, 84 N.E.2d 897 (1949); *Broughton v. South Carolina G. & F. Dept.,* 219 S.C. 50, 64 S.E. 152 (1951); *Roberts v. M.S. Carrol Co.,* 68 So.2d 689 (La. App. 1953); *Wiltze v. Borden's Farm Products Co.,* 328 Mich. 257, 43 N.W.2d 842 (1951).

Two Wisconsin cases phrase the standard of proof required of a claimant in terms of dispelling any "legitimate doubt" in the mind of the compensation agency: *Dentrice v. Ind. Comm.,* 254 Wis. 159, 35 N.W.2d 218 (1949); *Skelly v. Ind. Comm.,* 254 Wis. 315, 36 N.W.2d 58 (1949). And in *Lopez v. Kennecott*

Copper Corp., 71 Ariz. 212, 225 P.2d 702 (1950), the court said that the claimant must show affirmatively that he is entitled to compensation, that the commission is not required to disprove claimant's contention, and that if reasonable men could reach different conclusions from the evidence the decision of the commission has the same force as the verdict of a jury. For other cases adhering to this principle, see: *Rogers v. Williams*, 196 Va. 39, 82 S.E.2d 601 (1954); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Reeves Motor Co. v. Reeves*, 204 Md. 576, 105 A.2d 236 (1954); *McCaleb v. Greer*, 267 S.W.2d 54 (Mo. App. 1954); *Rick v. Ind. Comm.*, 266 Wis. 460, 63 N.W.2d 712 (1954).

Disability or death from some potentially fatal disease which is the result of the progression of natural causes unrelated to some industrial mishap (as was here testified to with reference to the deceased) is not compensable. It has even been said that there is a presumption that a diseased condition which has been shown to exist is idiopathic as to both origin and development. *Macko v. Raritan Valley Farms*, 131 N.J.L. 283, 35 A.2d 872 (1944). Also see, *Black v. Mahoney Troast Const. Co.*, 168 A.2d 62 (N.J. Super. 1962).

Whether such a presumption of this kind may or may not be said to exist under the Longshoremen's Act is immaterial to decision here. What is important

is that the burden to establish industrial compensability is on claimants, and this the present claimant has failed to do to the satisfaction of the deputy commissioner.

CONCLUSION

In view of the above it appears that the deputy commissioner's finding that the employee's death was due to his antecedent coronary disease and unrelated to his work activities is supported by the record, and under the authorities cited herein should be accepted upon judicial review. The judgment of the court below sustaining the order was proper and should be affirmed.

Respectfully submitted,

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October, 1965

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER G. ROSE,
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Attorney for Appellee O'Leary.

No. 20155

United States
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for the Ninth Circuit

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Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

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The briefs filed herein by appellees completely fail to deal either with the issues raised or the cases cited by claimant. Claimant's position may be without merit, but nothing said by the opposing parties leads to that conclusion, because neither brief condescends to discuss claimant's position. The single exception to this state-

ment is the "entire agreement" of the employer and carrier with one of claimant's two major premises: that the finding regarding the strenuousness of the work was irrelevant.

For authority, claimant relied principally upon the cases of *Hancock* v. *Einbinder,* 310 F.2d 872 (C.A. D. C., 1962) and *Vinson* v. *Einbinder,* 307 F.2d 387 (C.A. D. C., 1962). The inconvenience of these cases to appellees is circumvented by the simple expedient of ignoring them.

Admitting that the finding in question is totally irrelevant (Br. 7-8), the employer argues that it can be ignored because "every phrase in a judicial opinion should not be subject to withdrawal from context for hypercritical scrutiny . . ." It is seldom that so much error is compressed in a portion of a sentence. The phrase was not withdrawn from context; it is not from a judicial, but an administrative, proceeding; and it was not part of an opinion, but a finding of fact (R. 6). It is precisely because a court, reviewing an administrative decision, is entitled to know what facts were found, that this type of detail must be set forth in a compensation order. When an administrative agency makes what may be a crucial finding, which is legally irrelevant and factually erroneous, the claimant whose rights are thereby adjudicated, as well as the court that must review the decision, is entitled to some explanation.

The deputy commissioner's brief furnishes no explanation whatever. Like the employer's brief, it fails to suggest that the finding is supported by evidence.

Unlike the employer, the deputy commissioner also neglects to discuss whether the finding was relevant.

The deputy commissioner's brief does assert that he was warranted in concluding that claimant had not sustained the burden of establishing her claim (Br. 21). Claimant's position—which the brief ignores—is that it is impossible to determine from the deputy commissioner's finding what he considered that burden to involve. Did he believe that it was necessary for claimant to establish that the work in which decedent was engaged was more strenuous than normal? If not, why did he make such a finding, particularly when totally unsupported by evidence? This is the entire basis of claimant's appeal, but is not deemed by either appellee to be worthy of discussion.

The deputy commissioner's brief does make a few statements which, while of no particular significance, are so far out of line that claimant begs the Court's indulgence for noting them. Thus, when the error of government counsel in failing to file the testimony of Dr. Rose with the rest of the record was discovered, it was stipulated that Dr. Rose's testimony was cumulative in relation to the issues arising on review (R. 96). The statement in the deputy commissioner's brief that this stipulation "corroborates" the evidence that the employee died as a result of pre-existing disease and not as a result of his work (Br. 15-16) is wholly inappropriate and illegitimate. It was stipulated that Dr. Rose's testimony adds nothing for the purpose of this appeal.

The brief also makes the assertion that claimant's

simple statement that Dr. Buck, the pathologist, was not asked to express an opinion, was made by claimant "in a way intended to represent accusation of the employer's counsel . . . " (Br. 20). No one has a higher regard for the character and competence of employer's counsel than counsel for claimant. If there is anything in the factual statement that "Dr. Buck was not asked to express an opinion as to whether or not the death was work-related," that accuses or reflects adversely upon anybody, it is beyond our powers to discover.

Since the filing of claimant's brief, the Court of Appeals for the District of Columbia has decided *Howell* v. *Einbinder,* 350 F.2d 442 (C.A. D.C., 1965), a case so precisely in point as to be totally indistinguishable.

In *Howell,* as here, the workman suffered an unknown injury before the day in question. In both cases, he then worked strenuously. (Howell, unlike Higley, did not, however, die on the job.)

As in this case, the deputy commissioner found that decedent's work in no way aggravated or hastened his death. He specifically found more convincing the medical testimony, similar to that in this case, that the aneurysm took its natural course and was wholly unaffected by decedent's work. As here, there was contrary medical testimony. Also, as here, the doctors who testified that the work did not have any effect on the condition admitted that, had they known of the condition, they would not have permitted decedent to work.

As in this case, the deputy commissioner made a number of findings of limited relevance and dubious ac-

curacy, regarding decedent's lack of complaint that the work was too hard for him or made his head worse.

The court held that, "The reliance by the deputy commissioner upon these findings . . . casts grave doubt upon the substantiality of the evidence on the record as a whole to support the ultimate inference of non-aggravation. These findings are a completely inadequate and insubstantial basis for such inference."

The identical statement may be made of the finding regarding strenuousness in this case.

The court, having previously noted that the "substantial evidence" rule does not "require acceptance of an ultimate finding or inference if the decision discloses that it was reached in a manner which cannot be accepted as valid," went on to hold:

> "And when we consider the importance the Deputy Commissioner appears to have accorded the numerous findings of absence of specific complaint by decedent and his wife that his condition was related to his work, when neither knew what his condition was, we must conclude that the decision of the Deputy Commissioner was influenced by these inconsequential matters. Finally, the wording of the decision suggests that the Deputy Commissioner did not take into consideration the presumptions favorable to the employee or his dependents.
>
> "The features of the decision to which we have referred, while not leading us to direct an award of benefits to appellants . . ., do require that the order upon appeal be reversed, with directions that the decision of the Deputy Commissioner be set aside and the case remanded for reconsideration,

without prejudice to the reception of additional evidence if deemed desirable."

In summary, claimant submits that her position is either entirely conceded or totally unanswered. Nobody has suggested that the finding made was correct. Nobody has suggested why it was made. Nobody has attempted to discuss or distinguish the cases on which claimant relied. It is incumbent upon this Court, at the least, to remand the proceeding for an explanation by the deputy commissioner, and the application of the correct standard.

Respectfully submitted,

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Proctors for Appellants

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Appellees.

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEES W. J. JONES & SON AND NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-65

FILED
SEP 1 1965
FRANK H. SCHMID, CLERK

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BRIEF OF APPELLEES W. J. JONES & SON AND NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO.

JURISDICTION

Appellees W. J. Jones & Son, Inc. and National Automobile & Casualty Insurance Co. agree that this Court has jurisdiction by reason of the facts and statutes set forth in appellant's brief.

STATEMENT OF THE CASE

We are not disposed to quarrel with appellant's manner of stating the case, recognizing the need to place one's best foot forward, but must call attention to the omission of these significant facts:

(a) The pathologist, Dr. Buck, made microscopic tissue slide studies of the deceased's heart muscle and arteries as part of the autopsy. He found myocardial infarcations which prove death of the tissue a substantial time before the man expired (R. 43-48).

(b) While the deceased's wife claimed that the health of the deceased appeared to be good, she also admitted that during the year prior to his death he had fainted, had blurred vision, had suffered from headaches, had shortness of breath, and had been involved in an argument with her before leaving for work on the day of his death (R. 25-27, 30).

(c) There was competent medical opinion testimony which fully supports a finding that the death did not result from an accidental injury arising out of and in the course of this man's employment (R. 58-60, 67-68).

(d) The specific basis for rejection of the claim after a full hearing of the evidence was that:

> "The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged

at the time of his collapse and death on December 16, 1963." Deputy Commissioner's Compensation Order (R. 6).

ARGUMENT

A. Introductory Statement

Claimant concedes, as she must, that the findings of a Deputy Commissioner are presumed to be correct:

> "* * *(T)he findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

The test is clearly stated in *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 469, 67 S. Ct. 801, 91 L. Ed. 1028 (1947):

> "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." (330 U.S. at p. 477-478).

Hence, the only question presented and to be decided upon this appeal is whether there is substantial evidence in the record which supports the finding of Deputy Commissioner O'Leary

"* * * that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment * * * and it (the claim) is hereby REJECTED for the following reason: The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963." (R. 6).

B. Question Before Deputy Commissioner and District Court

Since there was competent evidence presented on both sides, the question presented to the Deputy Commissioner was whether the employee's heart condition and his death therefrom was the result of accidental injury "arising out of and in the course of employment", 33 U.S.C.A. § 902(2),(11). This question must be determined by the Deputy Commissioner on the basis of all of the evidence before him. *Liberty Mut. Insur. Co.* v. *Gray,* 9th Cir., 137 F.2d 926 (1943); *Gooding* v. *Willard,* 2d Cir., 209 F.2d 913 (1954); *Eschbach* v. *Contractors, Pacific Naval Air Bases,* 7th Cir., 181 F.2d 860 (1950).

The Deputy Commissioner as trier of the facts, is entitled to resolve conflicts either way upon the basis of the testimony and evidence adduced at the hearing. He must also determine the credibility of witnesses, including medical witnesses. *National Labor Relations Board* v. *Walton Mfg. Co.,* 369 U.S. 404, 7 L. Ed. 2d 829, 82 S. Ct. 853 (1962); *John W. McGrath Corp.* v. *Hughes,* 2d Cir., 289 F.2d 403 (1961); *Todd Shipyards Corp.* v. *Donovan,*

5th Cir., 300 F.2d 741 (1962). Upon judicial review his determination should be accepted unless clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951); *Morrison-Knudsen Co.* v. *O'Leary,* 9th Cir., 288 F.2d 542, 544 (1961).

In this case, an experienced pathologist who performed the autopsy testified that the workman

> "* * * died as a direct result of the disease of his coronary arteries and the acute occlusion of the descending branch of the left coronary artery." (R. 43).

He further noted that the disease

> "* * * was all superimposed on an advanced atherosclerosis of his (Higley's) coronary arteries which was quite marked." (R. 43-44).

The pathologist estimated that the occlusion in the descending branch of the left artery had occurred some 4 to 12 hours before the time the man actually expired, and the occlusion or thrombosis of the right coronary artery had been present for between one to four weeks before his death (R. 43-44, 46-47). Furthermore, the left anterior descending coronary artery was 80 to 90 per cent blocked by deposits of fatty substances which thickened the lining of the artery and were wholly attributed to the natural disease process unrelated to the man's employment (R. 47).

Dr. Kenneth C. Wilhelmi, a specialist in internal medicine equally competent with appellant's expert, testified as follows:

"I would feel the cause of his death was a final ultimate occlusion in the anterior descending branch of the left coronary artery superimposed upon previous occlusive disease of the right coronary artery as well as partial previous occlusion of the anterior descending branch." (R. 59).

* * * * *

"* * * this man's death was due to this additive occlusion of the left anterior descending branch of the left coronary artery, and I do not feel that the physical effort per se, we have no evidence or information that makes us believe that it was related to the occurrence of the occlusion." (R. 60).

Upon extensive examination and cross examination the doctor fully explained the basis for his opinion that the death was not connected with the employment and was the result of the latest occlusion or thrombosis that he and the pathologist both agreed occurred a substantial time prior to the actual death (R. 60-70).

C. No Presumption That Claim Compensable

Appellant states at page 12 of her brief

"The applicable law which he (the Deputy Commissioner) administers presumes the claim to be compensable 'in the absence of substantial evidence to the contrary.' 33 U.S.C.A. § 920 (a);"

While this is a correct interpretation of the law when a claim has been allowed, *General Accident Fire & Life Assurance Corporation* v. *Donovan,* D.C. Cir., 251 F.2d 915 (1958), or when there has been an entire lack of competent evidence; the presumption no long-

er exists where competent evidence has been introduced on the question of lack of causal connection between the accident and death. See, *Liberty Mutual Insurance* Co. v. *Gray,* 9th Cir., 137 F.2d 926, 928 (1943).[1]

As stated in *Nardi* v. *Willard,* S.D. N.Y., 156 F. Supp. 425, 429 (1957):

> "The presumption in favor of the claimant contained in Section 920 of the Longshoremen's and Harbor Workers' Compensation Act has not 'the attribute of evidence in the claimant's favor.' 'Its only office is to control the result where there is an entire lack of competent evidence.' Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229. Where competent evidence has been introduced by the carrier on the question of lack of causal connection between the accident and the death, presumption (sic) drops out and the question must be determined by the Deputy Commissioner on the basis of all the evidence before him."

D. Strenuousness of Work Not Basis of Rejection

Claimant bases her principal claim of error upon a statement of the Deputy Commissioner that the work in which decedent was engaged was similar to and no more strenuous than the type of work in which he was customarily engaged.

Curiously, appellant in the same breath admits that such a finding is irrelevant, with which we entirely

[1] On the contrary, the presumption is rather that the Deputy Commissioner's findings of fact are correct where challenged in a judicial proceeding seeking to upset the same. *Burley Welding Works, Inc.* v. *Lawson,* 5th Cir., 141 F.2d 964 (1944); *Pan American Airways* v. *Willard,* S. D. N. Y., 99 F. Supp. 257 (1951).

agree. Whether the work in which decedent was engaged at the time of his death was more strenuous or less strenuous than the type of work in which he was customarily engaged has no bearing in this case.

To be error, and therefore appealable, the statement referred to would have to be the basis of denial of compensation. There is no indication whatsoever that Deputy Commissioner O'Leary rejected the claim on the basis that the claimant was engaged in a more strenuous type of work than that in which he was customarily engaged. In fact, one does not have to engage in surmise, as appellant would have this court do, but need only look to the succinct statement of the Deputy Commissioner for rejecting the claim:

> "The death of the deceased was due to advanced coronary disease and was in no way related to the work in which he was engaged at the time of his collapse and death on December 16, 1963." (R. 6).

Appellant's quotation from A. P. Herbert should not be dignified with an answer. Suffice it to say that every phrase in a judicial opinion should not be subject to withdrawal from context for hypercritical scrutiny in a strained effort to "suggest(s) the application * * * of an erroneous legal standard" (App. Br. 9) by the Court or hearing officer below. As the Court of Appeals for the Second Circuit has said:

> "The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence it was at least an expression of the determination of the Commissioner that the evidence was short to show

affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee (widow) * * * no more was needed to support his decision * * *." *Gooding* v. *Willard,* 2d Cir., 209 F.2d 913, 916 (1954).

Claimant also makes the assumption that the only heavy manual labor which the deceased had done during his lifetime was that which he was doing at the time of his death. This is another assumption which cannot be drawn from the record. Grading work and the operation of a logging crane (R. 28, 29) can obviously be extremely arduous and physically as exerting as moving timber on rollers (R. 34).

What the record does indicate, without significant contradiction, is that the death resulted from heart disease wherein the right coronary artery had been blocked or occluded due to natural disease processes some time during the previous month, and the left descending artery, almost entirely closed by fatty deposits, sustained a similar occlusion some four to twelve hours before death occurred. These facts were developed by Dr. Charles E. Buck during the autopsy, by taking slides of various parts of the organ and microscopically examining the same. The slides clearly showed infarctive changes in the heart muscle, indicating death of the tissue a substantial number of hours beforehand as a result of the left descending artery occlusion which had occurred earlier in the day or sometime during the night before (R. 43-48).

The pathologist's opinion was confirmed by Doctor Wilhelmi, who was of the opinion that the decedent died as a result of the two occlusions superimposed upon the "extensive atherosclerotic disease in all of the coronary arteries, the aorta as well" as found by Doctor Buck (R. 59-60). While he agreed that a judicious practitioner would not have advised a man with known heart occlusion to engage in heavy labor, he also pointed out that each case is individualized, that where a man has been regularly working it is equally dangerous to put him on sedentary activity, and that numerous studies have revealed that death from myocardial infarctions and coronary artery occlusions can just as often occur at any time or place and will very frequently occur when a person is at complete rest or asleep (R. 64, 70). The doctor testified that, in his opinion, there was no causal connection between Higley's employment and his death (R. 58-60, 67-68).

Upon the foregoing evidence the Deputy Commissioner concluded:

> "That the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named." (R. 6).

The only testimony to the contrary is that of Doctor Murphy, the claimant's internist, who based his entire

opinion on the premise that the occlusion causing death occurred approximately at the same time as death (R. 54), and, therefore, that the clinical and pathological findings made by Doctor Buck, the pathologist, were erroneous (R. 53-55). At the same time Doctor Murphy admitted that if there were such findings, as reported by the pathologist upon autopsy (R. 55), they would indicate that the occlusion occurred some time prior to death (R. 54, 55). He was in effect stating his opinion that the myocardial infarctions which the autopsy revealed, did not exist or at least that he would draw a different conclusion from them (R. 53, 58).

This speculative rejection of the positive findings by tissue slides taken in the course of the autopsy by Doctor Buck (which Doctor Murphy had never seen) could hardly be said to sustain the burden upon appellee to show causal connection.

Certainly it cannot be said that the District Court was unwarranted in concluding, from the record as a whole, that claimant had failed to sustain the burden resting upon her to establish her claims as found by the Deputy Commissioner.[2]

[2] Compare the very similar case of *Granholm* v. *Cardillo,* D.C. Cir., 116 F.2d 948 (1940).

CONCLUSION

The record clearly indicates that when the correct tests are applied to the facts which were before the Deputy Commissioner and the District Court, the findings and the basis of the rejection of the claim are accurate and are supported by substantial evidence.

As Judge Denman of this court pointed out over 20 years ago in deciding a case under the Longshoremen's and Harbor Worker's Compensation Act, it is not the function of a reviewing court

> "* * * (T)o weigh the evidence to make its choice of * * * two possible inferences from the testimony. This was the function of the Deputy Commissioner." *Liberty Mutual Insurance Co.* v. *Gray, supra,* 137 F.2d at p. 928.

The judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WM. H. POOLE, Attorney

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AUG 3 1965

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No. 20155

United States
COURT OF APPEALS
for the Ninth Circuit

EDITH L. HIGLEY, Widow of Darold B. Higley, Deceased,

Appellant,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, W. J. JONES & SON, INC., and NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S BRIEF

JURISDICTION

Appellant is the widow of a workman who died of a attack while working as a longshoreman employed by W. J. Jones & Son, Inc. She made timely claim for death benefits for herself and the surviving children of the deceased workman, under the Longshoremen's and Harborworker's Compensation Act, 33 U.S. C.A. § 901, et seq. (R. 4). Her claim was rejected by a compensation

order dated August 13, 1964 (R. 5-6). The District Court entered a decree granting the motion of the Deputy Commissioner for a summary judgment and denying the motion of libelant for a summary judgment (R. 81-82). Because of doubt as to the appealability of the decree in question, a further judgment was entered on June 30, 1965 (R. 93).

This is a civil suit in admiralty commenced by a libel in personam to review the compensation order. The order was made on August 13, 1964 (R. 6). This suit was filed on September 9, 1964 (R. 1). The District Court had jurisdiction by virtue of 33 U.S.C.A. § 921 (b), and 28 U.S.C.A. § 1333. The factual basis for jurisdiction is set forth in Article III of the libel (R. 2), which was admitted by the other parties, except for the allegation that decedent sustained an employment related injury that resulted in his death (R. 7, 14-15).

The decree of the District Court granting libelant's motion for summary judgment was dated and filed on April 5, 1965 (R. 81-82). Notice of Appeal was filed on April 22, 1965 (R. 83). By reason of doubt as to the finality of the decree of April 5, 1965, a further judgment was entered on June 30, 1965 (R. 93), and notice of appeal from this judgment was filed on June 30, 1965 (R. 94). This Court has jurisdiction pursuant to 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On December 16, 1963, decedent, while employed as a longshoreman by W. J. Jones & Son, Inc., sud-

denly collapsed and died (R. 37, 40). It was about four o'clock in the afternoon, and his gang had been working since eight that morning (R. 33, 41). Decedent had worked normally during the entire day, and had made no complaints regarding his physical condition (R. 34-35, 39-40). Nothing unusual was noticed by his fellow workmen prior to his collapse (R. 34, 39).

The work in which he was engaged at the time of his death was moving heavy timbers (R. 33) into place with a peavey (R. 34). The men had been doing the same work all day (R. 33), and the work was pretty steady during the course of the day (R. 35).

The type of work he was doing is one of the two heaviest jobs on the Longview waterfront (R. 33, 36). It is harder than the rest of the longshore work (R. 39), and takes "brute strength" (R. 36).

At the time he collapsed, decedent and three other men were engaged in peaveying the timbers into place, and decedent was "shoving or straining on his peavey" (R. 35, 40), against a timber which four men could not have lifted (R. 39). While he was pushing against the timber, he fell over on to the winch driver, turned several colors, gasped or snorted, and died (R. 37, 40-41).

Decedent was 43 years of age at the time of his death (R. 25). His health appeared to be good, so far as his wife could observe (R. 25). He was seen by a doctor on two occassion in November, 1962, for chest pain. His condition was diagnosed as "possible coronary arteriosclerosis," which was "a symptomatic" (*sic*)

(R. 26, 72-73). At that time, he was off work from December, 1962 to March, 1963 (R. 29), and then was released by the doctor to go back to work (R. 30). It was then he commenced longshoring (R. 27, 30) at which he worked steadily until his death (R. 27). Before the episode of November, 1962, he had worked for about four months at a service station (R. 29), and for approximately 12 years prior to that time, he had worked as a crane operator (R. 28-29). Decedent was a moderate smoker and very seldom drank (R. 31).

Medical testimony was produced from four physicians. Dr. Buck, a pathologist who had performed an autopsy on decedent (R. 42), testified that he died as a direct result of disease of his coronary arteries and an acute occlusion of the descending branch of the left coronary artery, all superimposed on an advanced atherosclerosis (R. 43-44). He found evidence of an occlusion of the right coronary artery which had been present for 7 to 28 days (R. 43), and a very recent occlusion of the left coronary artery, which was present for 4 to 12 hours (R. 43). There were no other pre-existing conditions of significance (R. 44). There was almost total absence of edema of the lungs, which was indicative of a very sudden death (R. 45). Dr. Buck was not asked to express an opinion as to whether or not the death was work-related.

Claimant's expert, Dr. Murphy, a specialist in internal medicine (R. 49), expressed his opinion, based upon a hypothetical question (R. 50), that the unusual exertion which decedent was performing aggra-

vated a pre-existing condition and set in motion the processes that resulted in the occlusion of the coronary vessels (R. 51-52). The strain which the decedent was undergoing would tend to increase the blood pressure, increase the heart rate, and increase the respiration, by all of which means it would tend to bring about the occlusion which caused the death (R. 52). Clinically, Dr. Murphy stated that he was unable to agree that the second occlusion occurred 4 hours before death (R. 53), because all of the evidence indicated that it happened suddenly (R. 54-55).

The employer called Dr. Wilhelmi, also an internist (R. 56), who testified, based upon a hypothetical question (R. 57-59), that the physical effort in which the workman was engaged was not related to the occurrence of the occlusion (R. 60). Dr. Wilhelmi admitted that, had he known the condition of the decedent's heart, he would have recommended against strenuous physical activity (R. 63-64), and if he had known that the man had had a coronary occlusion within the last couple of weeks he would not have allowed him to work at all, even at light work (R. 65). The doctor testified, however, that, in his opinion, if the decedent had stayed home in an oxygen tent all day, he would have died at precisely the same time (R. 68-69), and that the increase of heart rate and blood pressure and the other effects of strenuous physical activity had nothing to do with his death (R. 69).

The employer also called Dr. Leonard Rose, whose testimony was inadvertently omitted from the record

filed by the Deputy Commissioner with the District Court in support of the Motion for Summary Judgment. It is stipulated by all of the parties that his testimony is cumulative with respect to the issues involved in this appeal, and that it is not necessary for the Court to consider his testimony in reviewing the correctness of the Deputy Commissioner's decision (R. 96-97).

Based upon the foregoing facts, the Deputy Commissioner concluded that (R. 6):

> ". . . for approximately nine months previous to said date the deceased had been employed as a longshoreman and the work in which he was engaged at the date of his death was similar to and no more strenuous than the type of work in which he was customarily engaged; that the immediate cause of death was an acute anterior myocardial infarction due to advanced atherosclerosis of the coronary arteries and acute thrombosis of the left coronary artery; that the work in which the deceased had been engaged prior to his collapse and death did not contribute in any way to his death and the deceased did not sustain an accidental injury arising out of and in the course of his employment by the employer above named."

Claimant brought injunction proceedings in admiralty pursuant to the provisions of 33 U.S.C.A. § 921 (b) in the United States District Court for the District of Oregon. The employer and carrier were permitted to intervene (R. 13). The Deputy Commissioner and the claimant each moved for a summary judgment (R. 16, 76). The Honorable William G. East rendered a brief

Memorandum (R. 78-80) affirming the Deputy Commissioner, and a decree was entered granting the motion of the Deputy Commissioner for summary judgment and denying claimant's motion for summary judgment (R. 81-82).

The questions presented are as follows:

A. Did the Deputy Commissioner err in finding that the work in which deceased was engaged was similar to and no more strenuous than the type of work in which he was customarily engaged, when the uncontradicted evidence was directly to the contrary?

B. Did the Deputy Commissioner apply an erroneous legal standard to determination of the issues before him in giving consideration to the question whether the work in which deceased was engaged was more strenuous than that in which he was customarily engaged?

C. Does the undisputed evidence require a finding that the claim should have been accepted?

SPECIFICATION OF ERROR

The District Court erred in granting the motion of the Deputy Commissioner for a summary judgment confirming the compensation order, and in refusing to grant the motion of the claimant for a summary judgment setting aside the compensation order.

SUMMARY OF ARGUMENT

The Deputy Commissioner made a finding that the work in which decedent was engaged "was similar to and no more strenuous than the type of work in which he was customarily engaged." This finding is erroneous, both legally and factually.

The finding is erroneous legally because it makes no difference in determining if the death is compensable whether the strain to which decedent was subjected was normal or abnormal. In either event, if the strain contributed to the death—and the statute creates a presumption that it did—claimant is entitled to compensation.

The finding is erroneous factually because the undisputed evidence in the record establishes that decedent, who had been working hard all day, was performing one of the two hardest jobs on the waterfront, and, at the moment of his collapse, was straining with three other men to move a heavy timber.

When the correct legal standard is applied to the undisputed facts in the record, claimant contends that the Court should order the rejection order set aside, and that claimant be awarded compensation. At the least, she is entitled to have the cause remanded for the application of the correct rule to the facts in the record.

ARGUMENT

A. Introductory Statement.

In presenting argument on this appeal, claimant fully understands and appreciates the heavy burden imposed upon one who attempts to assert that a compensation order should be set aside. The Deputy Commissioner's findings of fact are presumed to be correct, and they must be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951); *Voris* v. *Eikel,* 346 U.S. 328, 74 S. Ct. 88, 98 L. Ed. 5 (1953). It is nevertheless the rule that the findings of the Deputy Commissioner must be supported by evidence in the record, and his ultimate conclusion must be based upon the application of the appropriate legal standard to the facts in the record.

In this case, claimant respectfully submits that the Deputy Commissioner went astray in both of the foregoing particulars, and that, in both respects, the defect is related to the Deputy Commissioner's finding that the work in which decedent was engaged at the time of his death was "no more strenuous than the type of work in which he was customarily engaged . . ." This finding is not only wholly unsupported by the evidence; it is in direct contradiction to the undisputed evidence. Moreover, it strongly suggests the application by the Deputy Commissioner of an erroneous legal standard for determining what injuries are compensable. Absent this finding, it would be difficult to assert

that the Deputy Commissioner's rejection order is wholly without support in the record, but this finding ". . . is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions." Herbert, Uncommon Law (1935) p. 28.

There is no way for claimant to know why this finding was deemed by the Deputy Commissioner to be necessary, but consideration of whether claimant's work was more strenuous than normal at least implies that the Deputy Commissioner considered this to be a crucial factor in determining whether the death in question was compensable. As will be hereinafter shown, it is a factor which is totally irrelevant under the applicable law. The American Medical Association's Committee on the Effect of Strain and Trauma on the Heart and Great Vessels in its Report, published in *Circulation,* Vol. 26, pp. 612-622 (Oct., 1962), recommended that a different legal standard; namely, that heart failure of the congestive, coronary insufficiency or myocardial infarcation types should be considered related "to physical or emotional exertion only if the heart failure occurs during an actual period of stress clearly unusual for the individual involved." The determination of what is and what is not work-connected, however, is a question for Congress and the Courts, neither of which has seen fit to adopt this recommendation.

For a detailed and informed discussion of the policy, medical and legal factors entering into the determination of compensability of a heart death, see Marcus, "Prob-

lems of Compensability in Cardiovascular Disease Cases," 1964 Proceedings of the A.B.A. Section of Insurance, Negligence and Compensation Law, p. 405.

In any event, as hereinafter discussed, the uncontradicted evidence establishes that, at the very moment of his death, decedent was engaged in the most strenuous part of the most strenuous type of work which he did during the few months that he was a longshoreman. The contrary conclusion of the Deputy Commissioner is without any factual foundation whatever.

B. It is Irrelevant Whether the Work in Which Decedent Was Engaged was Unusually Strenuous.

Claimant respectfully submits that the question of whether the work in which decedent was engaged was similar to and no more strenuous than the type of work which he customarily did should never have arisen. It indicates the application by the Deputy Commissioner of a totally erroneous standard of compensability. As the Court stated in *Hancock* v. *Einbinder,* 310 F.2d 872, 876 (CA D.C. 1962):

> "The Deputy Commissioner's questioning of witnesses and certain passages in his compensation order emphasized the fact 'that the employee at the time of his death was performing duties consistent with the normal part of his job.' If his ultimate decision was based on the notion that an injury is not compensable unless it resulted from the performance of unusual work, he was mistaken. We said in *Commercial Casualty Ins. Co.* v. *Hoage,* 64 App. D. C. 158, 159, 75 F2d 677, 678 (1935):
>
> "'* * * It has been held a number of

> times, and we think correctly, that an accidental injury may occur notwithstanding the injured is then engaged in his usual and ordinary work * * *. It is enough if something unexpectedly goes wrong within the human frame. * * *' "

To the same effect is the holding in *T. Smith & Son, Inc.* v. *Donovan,* 227 F. Supp. 640, 643 (E.D. La., 1964), in which the Deputy Commissioner found that the work that decedent did on the day of his death "would not be considered strenuous work for a person of normal health . . . ," but nevertheless determined that a myocardial infarction was work-connected.

There may be substantial justification for an argument that a person who dies as a result of the normal strain of doing his normal work should not be considered to be a job-related casualty. This, as previously indicated, is a conclusion reached by the American Medical Association Committee. It is not, however, a permissible standard to be applied by the Deputy Commissioner. The applicable law which he administers presumes the claim to be compensable "in the absence of substantial evidence to the contrary." 33 U.S.C.A. § 920 (a); *Robinson* v. *Bradshaw,* 206 F.2d 435, 438 (CA D.C., 1953). Moreover, "that the injury occurs in the course of the employment strengthens the presumption that it arises out of it." *General Accident Fire and Life Assurance Corporation* v. *Donovan,* 251 F.2d 915 (CA D.C., 1958). It has even been held that occurence of a heart attack "immediately follow-

ing strenuous activities in itself raises an inference of a causal relationship between the activities and the attack." *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (CA 5, 1962).

In the light of this authority, it was not open to the Deputy Commissioner to determine that the death was not compensable because decedent's activities were no more strenuous than usual. They were strenuous, and, as the Court held in *Hancock* v. *Einbinder,* it made no difference whether they were more so than customary. See also *Vinson* v. *Einbinder,* 307 F.2d 387 (CA D.C., 1962), in which the strenuous work decedent was doing when he died was "a normal part of his job."

In this state of affairs, claimant is at least entitled to a reversal and a remand to the Deputy Commissioner for application of the appropriate standard. Compare *Vendemia* v. *Cristaldi,* 221 F.2d 103, 106 (CA D. C., 1955). In that case, it was held that a finding that a death from heart attack was not caused by an injury arising out of and in the course of the employment was insufficiently supported by the findings made by the Deputy Commissioner to enable the Court to determine the basis upon which his rejection order was made. It seems clear that the identical rule should apply where the findings make it apparent, although not explicit, that an erroneous legal standard was adopted.

C. The Uncontradicted Evidence Established the Strenuousness of the Work.

Only two witnesses testified regarding the nature of the work which decedent was doing at the time of his

death, and only decedent's wife testified regarding the work he had done previously. He had worked for twelve years operating a crane, then for four months in a service station, and then had been off work for several months until he started longshoring. He longshored for nine months before his death. Thus, the record indicates that the type of work that he had been doing prior to the nine months before his death was not heavy manual labor.

The record establishes that, on the day of his death, he had been working hard all day at the hardest type of work on the Longview waterfront, and, at the exact moment he collapsed, he was "shoving or straining on his peavey" along with three other men in an effort to manhandle a heavy timber into place, a job taking "just brute strength." The timber was too heavy for four men to have lifted.

If it were possible to contradict this evidence, either with regard to the general type of work available on the Longview waterfront, or the precise type of work which decedent was doing at the time of his death, no one should have been better able to produce such evidence than his employer, a stevedore company. No such evidence was produced.

It is, therefore, uncontradicted that, during the previous nine months, decedent had been doing work harder than he had been previously accustomed to; that on the day of the accident, he was working hard at the most strenuous part of that work, and that, at the moment of his collapse, he was straining to perform the

most physically demanding part of the hardest work involved in longshoring.

The decision in *Vinson* v. *Einbinder,* 307 F.2d 387 (CA D.C., 1962) is squarely in point. In that case, decedent died after one and a half to two and a half hours of driving and backing a truck on which a heavy crane was mounted. The Deputy Commissioner found that this was "a normal part of his job" and that he "was not subjected to heavy physical strain." He held that the death did not result from injury arising out of and in the course of the employment. The Court held that there was no substantial support in the record for this conclusion, that all of the evidence was that the the work in which decedent was involved was strenuous and that "it seems clear that this was one of the times when his job was very strenuous."

To much the same effect is the previously cited case of *Hancock* v. *Einbinder,* 310 F.2d 872 (CA D.C., 1962), in which the Deputy Commissioner's findings that the death was not compensable was set aside. He had found that decedent "was not subjected to heavy physical strain or unusual exertion." The undisputed evidence was that the decedent had been performing his normal duties which included dragging 80 pound sacks across the floor.

A similar holding is *Mattison* v. *Brown,* 197 F.2d 414 (CA 7, 1952). In that case, the claimant fell and suffered injury, allegedly as a result of poisoning by carbon monoxide gas and sulfuric acid fumes. The Deputy Commissioner made a finding that the area in

which he was working had a roof about 40 feet high "with ventilation at the top." The undisputed evidence of plaintiff and one of his fellow workmen was that there was no ventilation. The Court held that the Deputy Commissioner's findings were unsupported by the record, and that the Deputy Commissioner's rejection order should be set aside.

Claimant recognizes that this Court, as well as other Courts, has held that the Deputy Commissioner is not required to accept the opinion or theory of a medical witness, and that his decision may be sustained if supported by the record as a whole, even if no doctor directly testifies to a causal relationship. *Crescent Wharf and Warehouse Co.* v. *Cyr,* 200 F.2d 633, 637 (CA 9, 1952); *Todd Shipyards Corp.* v. *Donovan,* 300 F.2d 741, 742 (CA 5, 1962). The cases previously cited, however, illustrate that the Deputy Commissioner can not reject the uncontradicted evidence regarding the basic facts. The Deputy Commissioner's factual determinations must find some support in the record; they cannot be sustained if they are diametrically opposed to the uncontradicted and credible evidence in the record.

The finding of the Deputy Commissioner in this case, that decedent's work was similar to that in which he was customarily engaged, and no more strenuous, is simply not in accordance with the record. By its very nature, longshoring work involves a diversity of different types of operations, and the evidence is undisputed that stowing timbers is one of the two heaviest

jobs on the waterfront. Moreover, any type of work involves peaks and valleys of exertion; the evidence is also undisputed that, at the moment of his collapse, decedent was straining to perform the hardest part of the heaviest work. As in the *Hancock* case, supra, "This was one of the times when his job was very strenuous."

D. On the Record as a Whole, Claimant is Entitled to Compensation.

The preceding propositions would appear to call for a remand for further proceedings. Once the facts have been developed, however, and the proper legal standard ascertained, claimant submits that only one result can be reached. Based upon the undisputed evidence in the record, this Court should follow the precedent set in the cases of *Vinson* v. *Einbinder* and *Hancock* v. *Einbinder,* discussed above, and set aside the compensation order as being without substantial support in the record. It is not necessary that claimant prove an unusual physical strain, extraordinarily heavy work, or a previously healthy condition. "It is enough if something unexpectedly goes wrong within the human frame."

CONCLUSION

The findings of the Deputy Commissioner are not supported by substantial evidence in the record taken as a whole, and his crucial finding is diametrically contradictory to the undisputed evidence. The judgment of the Court below should be reversed, and the

cause remanded with instructions to set aside the rejection order entered by the Deputy Commissioner.

Respectfully submitted,

POZZI, LEVIN & WILSON,
PHILIP A. LEVIN
Of Proctors for Appellant

APPENDIX OF EXHIBITS

The only exhibits in this record are those attached to the motion of the Deputy Commissioner for summary judgment. In a sense, the official report of proceedings (R. 17-74) is an exhibit to that motion. The only exhibit offered before the Commissioner was claimant's exhibit No. 1, identified, offered and received at R. 26 and appearing at R. 72-74.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILIP A. LEVIN, Attorney

No. 20151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of AIR HANDLER, INC., a Corporation,

Plaintiff, Cross-Defendant and Respondent,

vs.

LEW F. STILWELL, INC., a Corporation, and UNITED PACIFIC INSURANCE CO., a Corporation,

Defendants, Cross-Complainant and Appellants.

APPELLEE'S REPLY BRIEF

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FILED
AUG 23 1965
FRANK H. SCHMID, CLERK

Inland Printing & Engraving Co., 430 Court Street, San Bernardino, California

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No. 20151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of AIR HANDLER, INC., a Corporation,

Plaintiff, Cross-Defendant and Respondent,

vs.

LEW F. STILWELL, INC., a Corporation, and UNITED PACIFIC INSURANCE CO., a Corporation,

Defendants, Cross-Complainant and Appellants.

APPELLEE'S REPLY BRIEF

I.
STATEMENT OF THE CASE

As set forth in appellant's opening brief, this is an action under the Miller Act (U. S. Code, Title 40, Sections 270, 270(a), 270(b), 270(c) and 270(d)). Use plaintiff is a subcontractor and the defendant, Lew F. Stilwell, Inc., a corporation, the prime contractor. Defendant, United Pacific Insurance Company, is the bonding company for the prime contractor.

The prime contract (Plaintiff's Exhibit 1) was executed on or about May 18, 1962. The subcontract

upon which this suit is based was executed on or about May 31, 1962 (Plaintiff's Exhibit 8). The prime contract called for performance of the entire job within 90 days, but no penalty attached for failure to complete within this time (Reporter's Transcript, page 16, lines 7-17). The work to be done by the use plaintiff comprised three fields: sheet metal, plumbing, and air conditioning (Plaintiff's Exhibit 8, the subcontract, and plaintiff's Exhibit 9, the specifications).

The total amount of the sub-contract was $102,-007.44; that thereafter due to certain changes required by the prime contractor there were two additional charges of $491.35 and $109.49 (Reporter's Transcript, page 76, line 21 to page 77, line 8).

August 5, 1962, defendant paid plaintiff $5,296,-.35 and on August 24, 1962, a further payment was made by defendant to use plaintiff of $7,803.51, and subsequent thereto certain payments were made by the defendant to the use plaintiff's suppliers in the aggregate of $56,098.92, leaving a total paid by defendant to use plaintiff and for his benefit of $96,-198.78 (Reporter's Transcript, page 75, line 7, page 76, line 1). This left a balance of $34,146.06.

Use plaintiff continued to perform under the terms of the subcontract until on or about October 30, 1962 (Reporter's Transcript, page 80, lines 20-22). On that date, the defendant ordered plaintiff off the job (Reporter's Transcript, page 70, line 9 to page 72, line 14). The job was accepted by the government on November 7, 1962 (Reporter's Transcript, page 243, line 18 to page 244, line 2). The prime contractor received the whole amount due under the prime contract with the government

December 3, 1962 (Reporter's Transcript, page 17, line 22 to page 18, line 7). Defendant, Lew F. Stilwell, testified that on or about December 3, 1962, he received the entire amount of the contract with the exception of $1.00 and another item that was in dispute and not involved with the subcontractor (Reporter's Transcript, page 242, line 22 to page 243, line 8). No complaint was made by the defendant, Stilwell, as to the quality of any work done by the use plaintiff as testified to by the foreman of the defendant, Mr. White, (Reporter's Transcript, page 230, line 5 to line 18). The action was filed on May 6, 1963, (Clerk's Transcript, page 2). Subsequent to the departure of use plaintiff from the job, Utility Heating completed the work of the use plaintiff. Arnold Miller, doing business as Utility Heating and Cooling, testified on behalf of the defendant. He indicated that the work which his organization did was very minor work (Reporter's Transcript, page 221, line 1 to line 6). The amount of the charge by Utility Heating to the prime contractor was in the neighborhood of $1,500.00 (Reporter's Transcript, page 221, line 17 through line 25). At the time of trial, defendant presented a "back charge" for earth work and cement work (Defendant's Exhibit S). This back charge was for $18,000.00 and was disallowed by the court. In addition to the back charge for the earth and cement work and the back charge for Utility Heating and Air Conditioning, the latter being stipulated to by use plaintiff, a third back charge appeared at the time of trial in Exhibit P. The back charge represented by Exhibit P and the Exhibit S aforesaid were never presented to the use plaintiff prior to the trial of the action (Reporter's Transcript, page 285, line 16 to page 286, line 4).

II.
ARGUMENT OF THE CASE

As was most aptly stated by Mr. Youngblood at the trial of the action, this matter and the action itself is a question of fact.

"THE COURT: This is a question of fact. I don't believe very much law is involved. It is a question of fact.

MR. YOUNGBLOOD: I think it is primarily a question of fact."

(Reporter's transcript, page 258, lines 12 to 15).

Certain issues of fact are set forth on page 4 of appellant's opening brief. We do not think the majority of them are pertinent. Point one is whether or not proper notice was given by use plaintiff as provided in Title 40, U. S. C., Section 270(b). In the case at bar there was a direct contractual relationship between the subcontractor use plaintiff and the defendant prime contractor. No notice is required under the Miller Act under such circumstances. See *U. S.* -vs- *U. S. Fidelity*, 113 Fed. 2d 888, *U. S. ex rel Hargis* -vs- *Maryland*, 64 Fed. Supp. 522, at page 527, *Continental Casualty* -vs- *U. S.*, 305 Fed. 2d 794, *U. S. for the Use of Strona* -vs- *Bussey*, 51 Fed. Supp. 996.

The second question of fact raised by appellant was whether or not use plaintiff was a duly licensed contractor. The fact that use plaintiff was such a contractor is set forth in Reporter's Transcript, page 52, line 13 to page 53, line 10. Also, the contract being performed on federal land, no state license was required. *Oklahoma City* -vs- *Sanders*, 94 Fed. 2d 323.

The next issue is whether or not use plaintiff furnished labor or materials within one year preceding the filing of the action. The record is replete that work commenced on or about June 22, 1962 and continued to about October 30, 1962, (Reporter's Transcript, page 54, line 18 to page 55, line 17). The defendant's foreman, Mr. White, testified that on or about September 20th when they went off the job, the job was completed 95.5% (Reporter's Transcript, page 230, line 5 to line 11). The issue raised by the appellant whether the work was done and performed under the contract has been accepted, was answered by testimony of defendant Stilwell (Reporter's Transcript, page 243, line 24 and 25). The further contention whether or not the defendant Stilwell has been paid by the government was again answered by testimony of defendant Stilwell that on or about December 3, 1962, he received the balance of the contract with the exception of negotiation with the government on some portion of the project not covered by the subcontract (Reporter's Transcript, page 243, line 3 to 8). The other issues of fact which the appellant assumedly raises we submit have been answered by the statement of the case which is foregoing. Testimony was adduced by the plaintiff Collins himself and by the defendant's foreman, Mr. White, to the effect that the use plaintiff was ordered off the job on or about October 30, 1962, at which time the percentage of completion was approximately 95.5% (Reporter's Transcript, page 231, lines 9-11).

The issues of law set forth by the appellant on page 6 of his brief would seem to be more in the nature of a dispute as to facts rather than law. The action was brought by the use plaintiff more than 90 days after the date that the use plaintiff last furn-

ished labor or materials and within one year from such date.

ARGUMENT OF THE LAW

Appellee agrees with appellant that the law of the place where the contract was entered into governs.

12 *Cal. Jur. 2d*, page 443, Section 221. "The commonlaw rule which required full performance in strict accordance with a contract before recovery could be had has been relaxed. It is settled, especially in the case of building contracts where one party is enjoying the fruits of a contractor's work, that if there has been a substantial performance in good faith, if the failure to make full performance can be compensated in damages, and if the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the work for the purposes for which it was intended, the performing party may, in an action on the contract, recover the amount unpaid on the contract price, less the amount allowed as damages for the failure in strict performance. Substantial justice is provided by this course of procedure and no property right is violated. While this principle, which is sometimes spoken of as the modern equitable doctrine of substantial performance, is applied most frequently in building and construction contracts, a substantial compliance meets the requirements of any obligation."

The record is replete by testimony of the defendant's own foreman as to the substantial completion of the job by the use plaintiff.

See also *Thomas Haverty* -vs- *Jones*, 185 California 285, 197 Pac. 105.

Complaint was made by the defendant that the

performance by the use plaintiff was not to his satisfaction. As shown by the records, no damages accrued to the defendant for any alleged delay. (Reporter's Transcript, page 243, line 9 to 17).

"However, the general rule is that failure to complete the work within the specified time does not ipso facto terminate the contract but only gives the owner the right to rescind the contract if he so elects, or in the alternative to claim compensation for the damage caused by the delay. Thus, where a contractor has failed to complete the work in the specified time but is urged by the owner to hurry the completion as much as possible, the conduct of the owner does not amount to a waiver of his right to damages for delay but only a waiver of his right to rescind. (9 *Cal. Jur. 2d*, page 294).

In this case no damages were shown whatsoever for any alleged delay on the part of the use plaintiff On the other hand, evidence is shown by the record that any delay in performance by the use plaintiff was occasioned by the lack of performance by the prime contractor. (Reporter's Transcript, page 68, line 19 to page 70, line 8).

Appellee further agrees with the appellant that the party holding the affirmative of an issue must produce the evidence to prove it as set forth in Section 1981 of the *Code of Civil Procedure* of the State of California. This provision is particularly pertinent to the allegation by the appellant of the allowability of his so-called back charges. The burden of proof is upon the party claiming the back charges as is set forth in *U. S. ex rel, Johnson* -vs- *Morely Construction Company*, 96 Fed. 2d 781. Requiring the use plaintiff to do earth fill work and cement laying although it was not included in the subcontract was

not sustained by any proof at all whatsoever by the defendant Stilwell. Indeed, it appears affirmatively from the plans and specifications being Exhibits 9 and 10, that no such requirement was to have been fulfilled by the use plaintiff. The other items appearing in Exhibit P relating to installation of metal doors and frames appeared in the specifications (Plaintiff's Exhibit 9) under section 24 and did not appear in the subcontract. Also, in Exhibit P defendant sought reimbursement for painting. Again referring to the specifications, such work is set forth in Section 27 and plaintiff was not required by his contract to do such work. Use plaintiff has agreed to the deduction of the clean-up charges which were made by Utility Heating and Air Conditioning. These other back charges were never raised at the pre-trial conference nor in the pre-trial order nor in the pleadings of the action and in fact were not brought to the attention of use plaintiff until the trial of this action.

ATTORNEY'S FEES

Under the provisions of the subcontract prepared by defendant, Stilwell, (Plaintiff's Exhibit 8) the parties stipulated that if suit is brought to enforce any provisions of this agreement or collect damages for breach thereof, the losing party shall pay to the successful party all costs and attorney's fees of the successful party's attorneys as fixed by the proper court.

In that connection, the trial court awarded the use plaintiff attorney's fees in the sum of $1,500.00. It is respectfully represented by the undersigned that the use plaintiff should be allowed in this appeal an additional sum of $1,000.00 for the reasonable value

of the services of use plaintiff's attorney's fees in this appeal.

CROSS-COMPLAINT

Lew F. Stilwell, Inc. filed a cross-complaint asking for $100,000.00 due apparently to the fact that the use plaintiff made demand for payment and filed suit to collect the money that was due him. See Reporter's Transcript, page 206, line 5 through page 207, line 12. However, the court permitted the defendant to testify as to his problems with respect to obtaining bonds. This testimony indicated that defendant could obtain bonds but that he had to get some financially responsible person to co-sign for him. He was asked by his counsel what expense he went to to effect such indemnity arrangements and he said $100,000.00. (Reporter's Transcript, page 209, lines 7 through 15). It is felt by the use plaintiff that there is absolutely no foundation in the evidence presented to the court, even looking at it most favorably, to the appellant to support a cross-complaint of any variety. As the trial court indicated that if it were the rule that the defendant in a Miller Act case could bring a cross-complaint for damage to his bond ability, then anybody who had a Miller Act case would be afraid to file such an action because he would be faced with a claim for damage.

CONCLUSION

Appellee respectfully represents that the decision of the trial court is overwhelmingly supported by the evidence; that since the matter is purely a question of fact, in the absence of an abuse of discretion the

judgment should be affirmed and that the appellee should recover costs herein together with attorney's fees for the work involved in this appeal.

Respectfully submitted,

FRED H. ALMY
Attorney for Appellee

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with these rules.

.....

Fred H. Almy

No. 20151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES to the Use of AIR HANDLER, INC., a Corporation,

Plaintiff, Cross-Defendant and Respondent,

vs.

LEW F. STILWELL, INC., a Corporation, and UNITED PACIFIC INSURANCE CO., a Corporation,

Defendants, Cross-Complainant and Appellants.

APPELLANTS' OPENING BRIEF.

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FILED
JUL 29 1965
FRANK H. SCHMID, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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vs.

LEW F. STILWELL, INC., a Corporation, and UNITED PACIFIC INSURANCE CO., a Corporation,

Defendants, Cross-Complainant and Appellants.

APPELLANTS' OPENING BRIEF.

I.

The Nature of the Case.

This is an action under the Miller Act by Use Plaintiff, subcontractor, against Lew F. Stilwell, Inc. as prime contractor, and United Pacific Insurance Co., as the bonding company for the prime contractor, pursuant to U.S. Code, Title 40, Sections 270a, 270b, 270c and 270d.

The Use Plaintiff seeks to recover from defendants the sum of $34,146.06 allegedly arising out of a written Subcontract dated May 31, 1962 [Ex. 8] between plaintiff and defendant Lew F. Stilwell, Inc., as a part of which Subcontract, the prime contract [Ex. 1] dated May 18, 1962 between the United States Air Force,

as owner, and Lew F. Stilwell, Inc., as the prime contractor, was incorporated by reference, including the deadline date for competion of the overall project, August 22, 1962 [Ex. E], which Prime Contract provided for the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base in San Bernardino County, California.

The written Subcontract [Ex. 8] was negotiated, entered into and to be performed within the State of California. In paragraph IV of plaintiff's Complaint [Tr. of Rec. p. 2], filed May 6, 1963, it is alleged by Use Plaintiff "That the date the last labor was performed and material supplied by the Use Plaintiff for the said defendant Lew F. Stilwell, Inc., a corporation, was on August 27, 1962; . . ." (which is admitted by defendants in paragraph IV of their Answer to Complaint). Admittedly, the Complaint was filed after 90 days and within 1 year after August 27, 1962.

II.

The Issues as Pleaded.

Plaintiff alleges that it furnished certain labor and materials to defendant Lew F. Stilwell, Inc., as the Prime Contractor, in the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base, San Bernardino County, California, under a written Subcontract [Ex. 8], which work plaintiff admits it never completed.

The facts admitted by the pleadings are as follows:

1. Jurisdiction for this action, if it exists, arises out of the Miller Act, Title 40 U.S.C., Section 270(b);

2. Lew F. Stilwell, Inc. is a California corporation, having a principal office at 315 South Beverly Drive, Beverly Hills, California;

3. United Pacific Insurance Company is a Washington corporation, having a principal office within the County of Los Angeles, State of California;

4. On May 18, 1962 defendant Lew F. Stilwell, Inc., as prime contractor, entered into a contract with the Department of the Air Force, Contract No. AF 04-(607)-7169, Bldg. 477, Alter Telephone Exchange, Project NOR-111-1, Part VIII, on which defendant United Pacific Insurance Company, as surety, made, executed and delivered to the United States a bond to secure performance of said contract;

5. On May 31, 1962, at Beverly Hills, California, defendant Lew F. Stilwell, Inc. and plaintiff entered into a contract in writing, copy of which is appended to Answer to Complaint herein [Ex. A];

6. "Exhibit A" provides, among other things, that if suit is brought to enforce any of the provisions of this agreement, or to collect damages for breach thereof, the losing party shall pay to the successful party all court costs and attorney's fees of the successful party's attorney as fixed by the proper court;

7. "Exhibit A" provides, among other things, that all work shall be done to the satisfaction of the owner (United States Government-Air Force) and its engineers, and in case any dispute arises between the contractor (Lew P. Stilwell, Inc.) and the subcontractor (Use Plaintiff), the owner (United States Government-Air Force) or its authorized representative shall determine any matter of fact concerning the same, and the parties hereto shall abide by its decision;

8. "Exhibit A" provides, among other things, that subcontractor shall not be entitled to receive final payment hereunder until the entire work to be done thereunder has been accepted by the owner, and the contractor shall be under no obligation to pay the subcontractor for any work done thereunder until contractor has been paid therefor by owner;

9. Plaintiff did in fact furnish certain labor and materials to defendant Lew F. Stilwell, Inc., as prime contractor, in the construction, alteration or repair of a public building or public work of the United States at Norton Air Force Base, San Bernardino County, California;

10. During progress of the work under said project defendant Lew F. Stilwell, Inc. directed Use Plaintiff, by certain written change orders to do additional work for the additional agreed sum of $491.35 and $109.49, respectively.

That defendant Lew F. Stilwell, Inc. has paid the following sums under "Exhibit A";

To plaintiff by check dated August 6, 1962	$5,296.35
To plaintiff by check dated August 24, 1962	7,803.51
To various plaintiff's suppliers	56,098,92
Total	$69,198.78

11. The Use Plaintiff did not complete the work to be done and performed by it under "Exhibit A".

The issues of fact remaining in dispute are as follows:

1. Whether or not proper notice has been given by the Use Plaintiff as provided in Title 40 U.S.C., Section 270(b);

2. Whether or not Use Plaintiff was at all times referred to herein a duly licensed contractor, as required by the California Business and Professions Code:

3. Whether or not Use Plaintiff, as subcontractor, furnished either labor or materials on the project constituting the subject matter of this action within one year immediately preceding the filing of this action and, if so, when, to what extent and in what amount;

4. Whether or not the work to be done and performed under the subject contract has been accepted by the United States Air Force;

5. Whether or not the defendant Lew F. Stilwell, Inc., as prime contractor, has been paid by the owner for the claim herein sued upon;

6. Whether or not defendant Lew F. Stilwell, Inc. owes plaintiff the sum of $34,146.06, or any other sum;

7. Whether or not Lew F. Stilwell, Inc. has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

8. Whether or not Use Plaintiff has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

9. Whether or not Lew F. Stilwell, Inc. ordered Use Plaintiff off the job on or about October 30, 1962 without cause;

10. Whether or not Use Plaintiff abandoned said project on or about August 27, 1962 prior to completion, after which Lew F. Stilwell, Inc. was required to and did obtain another subcontractor to complete

said project and, if so, if such conduct was legally justified; and

11. Whether or not Lew F. Stilwell, Inc. has sustained damages through the breach of "Exhibit A" by plaintiff in the sum of $100,000.00, or any other sum.

The issues of law remaining in dispute are as follows:

1. Whether or not trial court had jurisdiction of the subject matter of this action under the Miller Act, Title 40 U.S.C., Section 270(b);

2. Whether or not the complaint states facts sufficient to constitute a cause of action against the defendants or either of them;

3. Whether or not Use Plaintiff, as subcontractor, has done and performed the conditions precedent contained in "Exhibit A" on its part to be done and performed, and in accordance therewith;

4. Whether or not the within action is premature, in that the entire work to be done by Use Plaintiff has not been completed, and the entire work done by the prime contractor has not been accepted by the owner, and the prime contractor has not been paid by the owner for the claim herein sued upon;

5. Whether or not defendants are entitled to recover from the Use Plaintiff all court costs and attorney's fees to be fixed by the Court herein and, if so, in what amount;

6. Whether or not defendant Lew F. Stilwell, Inc., prevented Use Plaintiff from performing "Exhibit A" and, if so, whether such prevention was justified. [Tr. of Rec. p. 26.]

III.

Chronological Summary of Material Facts.

1. May 18, 1962—the prime contract [Ex. 1] was entered into between defendant Lew F. Stilwell, Inc., as prime contractor, and the United States Air Force, as a part of which defendant United Pacific Insurance Company made, executed and delivered its payment bond [Ex. 2] in the principal sum of $112,994.50, as security. By the express terms of the prime contract [Ex. 1] this entire project was required to be completed by the general contractor on or before August 22, 1962.

2. May 24, 1962—work was commenced by the prime contractor on this project (Air Force Contract File—Ex. E], on which the date scheduled for completion was August 22, 1962, covering "Plumbing, Air Conditioning, Sheet Metal, Equipment Rooms, etc."

3. May 31, 1962—the subcontract [Ex. 8] between plaintiff and defendant Lew F. Stilwell, Inc. was entered into, as a part of which "Exhibit No. 1" dated May 18, 1962 was incorporated by reference, including the deadline date for completion—August 22, 1962 [Ex. E].

4. June 4, 1962—the Daily Job Log [Ex. U] maintained by Marvin White, Superintendent in charge of this project, who bore the responsibility of getting the job done on time, was commenced.

5. June 21, 1962—Superintendent Marvin White ordered air cond & sheet metal on job Monday" [Ex. U], as the result of which and on the following day, Friday, June 22, 1962, plaintiff's foreman was "on job to arrange for start Monday", June 25, 1962 [Ex. U].

6. June 25, 1962—the Daily Job Log [Ex. U] reflects: "Air conditioning men on job doing demolition" (2 men on job), and according to "Exhibit R" these two men worked a total of 14½ hours on that date. "Exhibit R" likewise reflects that to and *including July 9, 1962* a total equivalent to only 8 men worked on this project for plaintiff, covering an aggregate total of only 24 man hours.

7. June 23, 1962—letter from the United States Air Force to defendant Lew F. Stilwell, Inc. complained of "delinquency of 11.9% as of June 20, 1962" which endangered performance under the prime contract.

8. July 3, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff, attempting to induce plaintiff to send workmen to the jobsite to proceed with this project without further delay [Ex. G].

9. July 10, 1962—the Daily Job Log [Ex. U] reflects: "Plumber will hold up A.C. slabs for few days to get his drains in & backfill".

10. July 12, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers delivered North section of A C units this A M. Are assembling same". "Plumbing still holding back A C sheds".

According to the testimony of William F. Sherman, Jr. on October 7, 1964 (under cross-examination), the first work performed by plaintiff's men on this project, according to Exhibit No. 5, was done by "2 sheet metal men" on July 12, 1962, but this appears to be an obvious error when compared to defendants' Exhibit R hereinbefore referred to.

11. July 16, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers started Hanging Ducts 10 A M in North Section".

12. July 17, 1962—letter from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. H] attempting to speed up plaintiff's work on this project.

13. July 20, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers on North Section are about 95% as of tonight Ducts only"

14. July 23, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers still on Ducts on North section but one about complete."

15. July 26, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers installing ducts over present phone equipment".

16. July 30, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. F] calling to plaintiff's attention that the job completion date was August 22, 1962, and "Imperative your part of this contract is completed on the above date", which telegram was followed up by said defendant on the following day, July 31, 1962, by letter to plaintiff [Ex. I].

17. August 8, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers putting steam on now to catch up. Crew worked 2 hours overtime tonight. They still will not make it on time".

18. August 9, 1962—the Daily Job Log [Ex. U] reflects: "Chiller not on job". (Plaintiff testified on cross-examination that the chiller was on the jobsite August 8, 1962 and was installed August 13, 1962).

19. August 10, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers have 4 sheet metal men on entire job. No A. C. men and no duct men", which resulted in telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. I] complaining plaintiff's installation crew not on jobsite.

20. August 13, 1962—the Daily Job Log [Ex. U] reflects: "Air Handlers are not making time they should as they are working under a reduced force".

21. August 16, 1962—defendant Lew F. Stilwell, Inc. wrote letter to plaintiff [Ex. J] complaining about plaintiff's delinquency on the job and plaintiff's failure to keep a conference appointment on Monday, August 13, 1962.

22. August 21, 1962—letter from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. 11] concerning charges to be made against plaintiff for required clean-up at jobsite.

23. August 22, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. K] confirming conference for Thursday, August 23, 1962, on which date, according to the Air Force Contract File [Ex. E] the status of plaintiff's work on this project was: "AC 85% complete" and "plumbing 96% complete".

The Court is respectfully reminded that this is the date on which this entire project including *all* of plaintiff's work, was to have been completed.

24. August 27, 1962—the Daily Job Log [Ex. U] reflects: "As for air conditioning work-job at standstill".

25. August 29, 1962—the Daily Job Log [Ex. U] reflects, concerning conference between Stilwell, Collins

and White, as follows: "Result is that Collins promised to start steam pipe work and pipe insulation work Thursday or Friday. Date set for his completion is Sept. 15".

26. September 6, 1962—the Daily Job Log [Ex. U] reflects: "No A C action job quiet and waiting for A C to continue" (which constitutes the last detailed entry in "Exhibit U".)

27. September 7, 1962—according to the Air Force Contract File [Ex. E] the air conditioning was only 90% complete.

28. September 21, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff [Ex. L] notified plaintiff that current payments under the subcontract were awaiting receipt by said defendant of satisfactory "releases". This telegram confirmed defendant's prior letter dated August 16, 1962 [Ex. J] in which plaintiff was notified that proper payroll reports would be required before any more partial payments on this project would be made to plaintiff.

29. October 5, 1962—telegram from defendant Lew F. Stilwell, Inc. to plaintiff, followed up by letter dated October 9, 1962 [Ex. 6] that by reason of plaintiff's failure to perform Exhibit 8 said defendant had no recourse but to complete and finish plaintiff's work.

30. October 12, 1962—telegram from plaintiff to Alliance Mechanical Conts. [Ex. A] and letter [Ex. D] threatening to name Alliance as co-conspirator "if you perform any work in connection with our contract. . . ."

Subsequently Utility Heating & Cooling Co. was employed by defendant Lew F. Stilwell, Inc. to complete a portion of plaintiff's work under the said air

conditioning portion of this project, which they did, and for which Utility was paid the sum of $1699.44 [Ex. T].

31. November 7, 1962—(contrary to plaintiff's admission, as contained in the pleadings) the last work was performed on this job. (According to William F. Sherman, Jr. who so testified on cross-examination; one of the sheets comprising Exhibit 3 confirms that the entire job was 100% complete on that date).

Lew F. Stilwell testified that this job was accepted by the United States Air Force on November 7, 1962.

32. May 6, 1963—Complaint herein was filed.

33. July 22, 1963—further partial payment of $1,308.22 was made by the United States Air Force to the prime contractor [Ex. 3].

34. August 17, *1964*—final payment hereunder was made by the United States Air Force to the prime contractor [Ex. 3].

IV.

Assignment of Errors.

1. Despite the fact that the complaint herein is filed under the jurisdiction of the Miller Act (U.S. Code, Title 40, Sections 270a, 270b, 270c, and 270d), this action is basically one for recovery under a written subcontract [Ex. 8, dated May 31, 1962], which admittedly was negotiated, entered into and to be performed within the State of California. Accordingly, construction of such contract is to be made in accordance with the laws of the forum.

Civil Code of the State of California, Section 1646.

2. Plaintiff cross-defendant and respondent is not entitled to any recovery herein, particularly by reason of its breach of the subcontract [Ex. 8] and by its nonperformance. According to the plaintiff's own testimony, this subcontract [Ex. 8] was not completed by plaintiff; in fact, plaintiff affirmatively attempted to prevent completion of said project by another subcontractor on work to have been done by plaintiff thereunder.

3. The within action was premature, particularly because final payment under the prime contract was not made by the Government to the prime contractor until August 17, 1964, more than one year after the filing of this action on May 6, 1963.

4. The trial court failed to charge plaintiff/cross-defendant and respondent and allow proper credit to the defendants for work done by the prime contractor, which was required to have been done by plaintiff/cross-defendant and respondent under its subcontract [Ex. 8].

5. The trial court erred in refusing to allow any evidence on the cross-complaint for alleged damages sustained by cross-complainant, Lew F. Stilwell, Inc., by reason of plaintiff/cross-defendant and respondent's failure to perform and the resulting controversy, and the inability of said cross-complainant to obtain other performance bonds which resulted directly therefrom.

V.

Argument and the Law of the Case.

Despite the fact that the Complaint herein is filed under the jurisdiction of the Miller Act (U. S. Code, Title 40, Sections 270a, 270b, 270c and 270d), this action is basically one for recovery under a written contract [Ex. 8] dated May 31, 1962, which admittedly was negotiated, entered into and to be performed within the State of California.

Accordingly, construction thereunder is to be made in accordance with the laws of the forum (*Civil Code Section 1646*).

Section 1439 of the Civil Code of the State of California provides:

> "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section."

Section 1440 of the Civil Code of the State of California provides:

> "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

It is commonplace to say that the burden rested on plaintiff to prove all of the material allegations of his complaint by a preponderance of evidence. Not only did he fail to do that, but the evidence clearly, positively and convincingly proves the nonexistence of facts requisite to plaintiff's recovery herein.

Section 1981 of the Code of Civil Procedure of the State of California provides:

> "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

The Court is respectfully reminded that defendants' Answer to Complaint herein not only alleges that no cause of action has been stated in the Complaint, but in addition thereto defendants affirmatively allege that the Complaint was prematurely filed, which defense is reflected in the Joint Pre-trial Statement as one of the issues of law remaining in dispute [p. 7, lines 13-18]:

> "Whether or not the within action is premature, in that the entire work to be done by Use Plaintiff has not been completed, and the entire work done by the prime contractor has not been accepted by the owner, and the prime contractor has not been paid by the owner for the claims herein sued upon."

Both the general Demurrer to the Complaint and the affirmative defense urged by defendants that said action was premature should be considered together because, under the terms of the contract, the cause of

action had not yet accrued when the Complaint was filed on May 6, 1963.

Despite timely objection to the proposed Findings of Fact and Conclusions of Law, and Judgment, herein, as a part of which defendants requested specific Findings, in accordance with the evidence, as follows:

> That at the time Use Plaintiff ceased work on said project it had not performed the work and furnished the materials on its part to be done and furnished, and was in default under its contract dated May 31, 1962 [Ex. 8];
>
> That the last labor furnished and the last materials supplied by Use Plaintiff on this job were performed and supplied on or about August 27, 1962 and not October 5, 1962;
>
> That the Use Plaintiff not only failed and refused to perform its contract dated May 31, 1962 [Ex. 8] and was in default thereunder, but in addition thereto attempted to prevent completion of the work to have been done under Use Plaintiff's contract by another sub-contractor;
>
> That Use Plaintiff's work on this project was only 85% complete [Ex. E] on August 22, 1962 and that no further work of any consequence was performed thereon by Use Plaintiff after that date [Ex. U];
>
> That LEW F. STILWELL, INC, was required to and did expend $18,030.00 [Ex. S] in order to complete the work to be performed by Use Plaintiff under its contract, which sum is over and above other allowances made in this matter and for which defendants are entitled to credit;

That Use Plaintiff did abandon said project prior to completion, as the direct and proximate result of which LEW F. STILWELL, INC. sustained damages which were uncertain and incapable of calculation by the Court;

That Use Plaintiff was in default under its contract dated May 31, 1962 at the time this action was filed; and

That LEW F. STILWELL, INC. was required to and did employ another sub-contractor to complete said job, which was supplemented by work and materials done and furnished by LEW F. STILWELL, INC., as prime contractor;

all of which requested specific findings were rejected by the trial court.

VI.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Judgment in favor of plaintiff and against defendants should be reversed.

Respectfully submitted,

N. E. YOUNGBLOOD,
Attorney for Defendants, Cross-Complainant, and Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

N. E. YOUNGBLOOD

NO. 20150

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 20150

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
For the Southern District of California,
Central Division

OPENING BRIEF OF APPELLANT JOSEPH SICA

FILED
OCT 15 1965
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OPENING BRIEF OF APPELLANT JOSEPH SICA

TO THE HEAD JUDGE AND JUDGES OF THE ABOVE-ENTITLED COURT:

COMES NOW the appellant, Joseph Sica, and respectfully files this, his opening brief; and by reason of the fact that these proceedings were carried on in the lower court in effect jointly (there was a joint hearing at which the arguments made by one were the arguments adopted by both), we have taken the liberty of referring to the brief filed on behalf of Paul John Carbo and throughout will refer to it and, with the Court's permission, will adopt portions of it, in the interest of brevity.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court for the Southern District of California, Central Division, had jurisdiction under 28 USC 2255, this being a proceeding to vacate and set aside sentences theretofore imposed in a criminal case, and for other relief pursuant to that section. The case in the lower court carried the number 65-91-BOLDT (Ancillary to No. 27973 CD). (CT 111).[1]

This is an appeal from the judgment denying relief, entered on March 9, 1965 (CT 122). Notice of appeal was filed on March 22, 1965 (CT 124).

[1] The record certified to this Court consists of the Clerk's Transcript (CT), the Reporter's Transcript of the hearing below (RT) and three exhibits. In accordance with Rule 18(2)(f) of this Court, the list of exhibits is set out as Appendix A hereto.

This Court has jurisdiction of the appeal under said 28 USC 2255 and under 28 USC 1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

After there had been jury verdicts of guilty, but before sentence and while there were pending motions for new trial, Hon. Ernest A. Tolin, the judge who had tried the case, passed away (CT 5-6). Pursuant to Rule 25 of the Federal Rules of Criminal Procedure, Hon. George H. Boldt was designated as successor judge (CT 6). Thereafter, defendant in the criminal action, petitioner and appellant here and hereinafter designated as petitioner, filed a supplemental motion for new trial urging that pursuant to Rule 25 the successor judge could not perform the duties required of him in passing upon the motions for new trial, because credibility and conflict-of-evidence questions were among the issues in said motions, which issues the successor judge was in no position to resolve, he not having presided at the trial, and, accordingly, under the Rule, a new trial should be granted (CT 6).

The supplemental motion was denied, the motions for new trial were denied, and petitioner was sentenced (CT 6). On appeal, this Court affirmed (CT 5; 314 F. 2d 718) and the

United States Supreme Court denied *certiorari* (CT 5; 377 US 953).

Following the return of the mandate upon denial of *certiorari*, petitioner timely filed, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, a motion for modification of sentence, which duly came on for hearing before the District Court, Judge Boldt presiding (Exhibit 3). At the time of the hearing of the motion, after counsel for petitioner and other defendants who had made similar motions had made their argument, and during the time Judge Boldt was announcing his ruling denying the motions, Judge Boldt said (RT 38-39; Exhibit 1):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this case, and before my case was concluded, and I had some ideas of his views of the case.

> From that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed."

This was the first time petitioner or his counsel knew or had any reason to believe that prior to his appointment as successor judge, Judge Boldt had discussed the case with Judge Tolin or that he had any knowledge of the case or Judge Tolin's views thereon (CT 7).

Following the conclusion of the hearing on the motion for modification of sentence, Judge Boldt instructed the court reporter, Samuel Goldstein, not to deliver to counsel the reporter's transcript of the proceedings until after Judge Boldt had seen his remarks (RT 35-36). Accordingly, Mr. Goldstein submitted to Judge Boldt a verbatim transcript of the proceedings (RT 34, 38, 39, 41) and, pursuant to the Court's instruction, did not deliver copies to counsel (RT 36-37). After he received the transcript from Mr. Goldstein, Judge Boldt made changes thereon in his own handwriting (RT 34; Exhibit 1) and instructed Mr. Goldstein to rewrite the transcript to read as changed, before filing the original or releasing copies (Exhibit 2).

The transcript thereafter received by counsel from the

court reporter (RT 36) read, as changed per Judge Boldt's instructions (RT 39, 41; Exhibit 3, p. 25), as follows:

(words deleted are crossed out, thus: ~~----~~; and words added are underlined, thus: ____)

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~- I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at ~~the other~~- opposite ends of the same hallway during the same period and ~~we~~- quite often saw each other at lunch-~~;~~- . ~~and~~-I had occasion to ~~see~~- talk with Judge Tolin after the verdict in this case, ~~and~~- before my case was concluded, and ~~I had~~- received some ideas of his views ~~of the~~- after the verdict in this case. ~~From that~~- I can--~~say and~~- affirm without any question whatever that the sentences I imposed ~~;I believe;~~- were more lenient than those ~~that~~- Judge Tolin ~~would~~- might have imposed."

Subsequent thereto, appellant herein, Joseph Sica, filed his petition (CT 94) and motion (CT 111)[2] under 28 USC 2255, on the ground that he had been denied due process of law, in violation of the Fifth Amendment to the United States Constitution, in that (1) the successor judge had received, prior to his appointment, information *coram non judice* concerning the case pertaining to matters upon which he was thereafter to adjudicate in motions for new trial, (2) the successor judge relied upon such information in exercising his function in passing upon the motions for new trial, and (3) that these facts were not known to said petitioner Sica or his counsel until after petitioner had exhausted his right to appeal, including petition for writ of *certiorari* in the United States Supreme Court.

In his 2255 motion, petitioner Sica asked (CT 111) that a United States District Judge other than Judge Boldt pass upon the 2255 motion, that Judge Boldt be a witness at the hearing of the 2255 motion, that the sentences previously imposed be vacated and set aside, that the order previously made denying petitioner's motions for new trial be set aside, and that a successor judge other than Judge Boldt be appointed pursuant to Rule 25 of the Federal Rules of Criminal Procedure,

[2] "Motion Pursuant to 28 USC 2255 To Vacate And Set Aside Sentence And For Other Relief" is annexed hereto as Appendix C.

to pass upon petitioner's motions for new trial. All of these were denied petitioner (CT 78, 122).

Prior to the hearing on the 2255 motion, after learning that Judge Boldt had been assigned to hear the motion, petitioner Sica filed his objections to Hon. George H. Boldt presiding at the hearing in connection with this matter, or acting in any manner (CT 114)[3].

Also prior to the hearing on the 2255 motion, Judge Boldt, *sua sponte*, filed an affidavit setting forth a version different both from what he had said from the bench during the motion for modification of sentence proceedings and as he had had the reporter's transcript changed, and setting forth an explanation (CT 30-32).

At the hearing of the 2255 motion, although advised by counsel for petitioner (RT 9-10) that it was their desire to call him, Judge Boldt, as a witness in the proceedings (because the Judge's statement from the bench in the motion for modification of sentence hearing, and the changes in the reporter's transcript made thereof, and the Judge's affidavit concerning said statement furnished a basis therefor), and

[3] "Objections To Judge Honorable George H. Boldt, U.S. District Judge, Presiding At The Hearing In Connection With This Matter, Or Acting In Any Manner" is annexed hereto as Appendix D.

that questions would be asked Mr. Goldstein, the court reporter, concerning communications between the two of them (RT 10), Judge Boldt refused to permit another judge to hear the motion (RT 29).

During the hearing on the motion, Judge Boldt refused to permit himself to be called as a witness (RT 58, 65) or to be interrogated concerning the matter (RT 58, 63, 66), and after making a statement as to certain questions counsel had proposed to ask him (RT 57-58), ruled that the affidavit he had filed "fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding" (RT 58). When counsel urged that the Court was denying the right to cross-examine an important witness, which is essential to due process of law (RT 66), the Court replied, "I do not agree, and your application is denied." (*ibid*) When counsel, pursuant to the Court's order that an offer of proof be made (RT 53), offered to prove, if the judge would submit to questioning, that there were variances, inconsistencies and conflicts in the various statements the judge had made and that was all they could offer at the time, "because we don't know what is in your Honor's mind" (RT 62), the Court interrupted and replied (*ibid*), "You do know what is on my mind because I have made a statement about it."

On the merits of the 2255 motion, the Court denied any relief (RT 26). Hence this appeal.

Questions Involved

1. Is due process of law denied where the only witness to the events giving rise to a claim for relief under 28 USC 2255 presides as judge at the hearing which was brought for the precise purpose of obtaining a judicial determination as to whether the conduct of the witness denied due process and a fair trial at a previous proceeding and where the said only witness is not allowed to be called or sworn as a witness nor allowed to be cross-examined?

This question was raised in the 2255 motion itself (Appendix C hereto) and by written motion (by both Carbo and Sica) addressed to the Chief Judge or Acting Chief Judge of the court below, prior to the hearing of the 2255 motion and immediately upon it being known to counsel for petitioner that the hearing on the 2255 motion had been assigned to the very judge whose conduct was the subject of the 2255 motion (CT [Carbo] 33-44). The motion was denied (CT [Carbo] 58).

The question was likewise raised by written motion addressed to the said judge whose conduct furnished the base

for the 2255 motion and to whom the said 2255 motion had been assigned for hearing (CT [Carbo] 75-76). The motion was denied (RT 29).

The question was also raised during the hearing on the 2255 motion, when the witness - who was then presiding as judge - was called (RT 53, 65) but refused to be sworn or interrogated (RT 58, 63, 65, 66).

2. Is a defendant in a criminal case denied due process of law and a fair trial on his motion for a new trial where the judge who was assigned to hear the matter as successor judge under Rule 25 of Federal Rules of Criminal Procedure, prior to his assignment and unknown to the defendant or his counsel, obtained information *coram non judice* upon which he relied in exercising his function as successor judge?

This question was raised by the motion pursuant to 28 USC 2255 and the oral proceedings held thereon (RT 30 - 76).

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellant's motions that a judge other than the Hon. George H. Boldt preside at the hearing of appellant's motion made pursuant to 28 USC 2255 and in allowing Judge Boldt to preside at the hearing of said 2255 motion.

2. The trial court erred in not requiring the Hon. George H. Boldt to be sworn as a witness and to testify at the hearing of appellant's motion made pursuant to 28 USC 2255.

The evidence sought to be elicited from Judge Boldt as a witness were answers to the questions (CT 42-44; RT 55, 61) set out in Appendix B hereto and incorporated herein as though fully set forth, and answers to such further questions as would appear appropriate depending upon the answers to the specific questions put.

In objecting to the refusal of Judge Boldt to be sworn as a witness or to answer the questions, counsel for petitioner Carbo urged (RT 59-61):

> "MR. WIRIN: Your Honor has said, and I haven't the slightest doubt but what your Honor has said in good faith, that your Honor is of the view that the statement which your

Honor made under oath disposes of or answers the portion of the questioning to which your Honor has referred.

. . .

"MR. WIRIN: But, of course, your Honor, it is a matter about which there might be honorable differences of opinion.

. . .

"MR. WIRIN: For instance, we who are sitting at the counsel table, and who are advocates -- not judges but advocates -- may have a point of view that precise interrogation, indeed cross-examination, often brings to light that which otherwise is not illuminated.

"Now then, your Honor, so there may be difference of opinions, your Honor, between judge and counsel; and counsel could in good faith believe that by questioning a person who has made a statement, they can bring out matters which are not as clear to them as it appears to be to the person who made the statement . . .

"(MR. WIRIN) . . . Shouldn't the judgment

as to whether or not counsel should have the right to interrogate your Honor in connection with the statement which your Honor made under oath, which your Honor now says covers and answers adequately all of the questions pertaining to that statement which we seek to propound, shouldn't a person of a different mind than your Honor, and other than your Honor, make that judgment, rather than your Honor who, whether you like it or not, perforce, of necessity and circumstance, really is passing judgment upon your own statement. And you are saying, 'My statement' -- you are saying what a witness would say to a lawyer. 'I have answered your question.' But the witness can't say that to a lawyer. Only an impartial judge can say to a lawyer that his questions have been answered.

"So your Honor, it seems to me, ought to, with the graciousness and humility which becomes a judge of the United States District Court, let some other person sit as judge over this matter with respect to the question as to whether or not your Honor's statement answers

all of the questions which we seek to propound."

Counsel for petitioner Sica stated[4] (RT 65-66):

"MR. PARSONS: . . . In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case, before my case was concluded, and received some ideas of his views after the verdict in this case . . .

"It is my desire to question you about that conversation; where it took place, who, if anybody, was present, and what was said by either you or Judge Tolin at that time."

Upon the Court's refusal to permit, counsel stated (RT 66):

"May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process

[4] The Court had previously ruled (RT 47) that "(e)verything that goes in will be applicable to both petitions. . . . And everything that is said will be applicable to both, unless it is clearly indicated otherwise."

of law."

To which the Court replied (*ibid*):

"I do not agree, and your application is denied."

3. The trial court erred in denying appellant's 28 USC 2255 motion, and each part thereof.

ARGUMENT

Summary of Argument

Appellant was denied due process of law and a fair hearing both at the motion for new trial proceedings in the criminal case and in the 28 USC 2255 proceedings filed upon his learning of the defect in the motion for new trial hearing.

As to the former, appellant contends that it is a denial of due process for a judge to preside at a matter as to which he had received, unbeknownst to the defendant, information *coram non judice*.

As to the latter, the 2255 proceedings, appellant contends that where the only witness to what that information *coram non judice* is, is the judge who presides at the hearing, who has, by causing changes to be made in the reporter's transcript,

made two different versions of the matter, and who thereafter in response to 2255 proceedings makes still a third and different statement as to what occurred, that that judge should not preside at the 2255 hearing and should be a witness therein. Appellant argues that his hearing presided over by said judge, and the judge not having permitted himself to be a witness or to be cross-examined, denied to him due process of law and, additionally, that for considerations of the fair administration of justice, such a proceeding should not be permitted to stand.

I

APPELLANT WAS DENIED DUE PROCESS OF LAW IN HIS 2255 HEARING, IN THAT THE PROCEEDING WAS PRESIDED OVER BY THE JUDGE WHOSE CONDUCT WAS THE SUBJECT OF THE 2255 MOTION AND IN THAT SAID JUDGE WAS NOT PERMITTED TO BE SWORN AS A WITNESS, NOR TO TESTIFY, NOR TO BE CROSS-EXAMINED

" . . . no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In re Murchison, 349 US 133, 136.

This principle would appear to be so ingrained in the law and in the Constitution as not to require discussion. The reason is manifest.

In *In re Murchison, supra,* where a one-man-judge grand jury heard the matter of an alleged contempt for what had occurred in the one-man grand jury investigation, the Court said (349 US at 138-139):

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than the testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. . . . Thus the judge, whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.
>
> " . . . There was no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place

in the secret chambers of the judge. If there had been they might have been able to refute the judge's statements about White's insolence. . . . If the charge should be heard before that judge (the one-man grand jury one), the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. . . . "

Similarly, in

Offutt v. United States, 348 US 11, 15:

" . . . The real issue is whether . . . such a ruling should have been made by the trial judge, or whether for the purpose of vindicating justice . . . the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt

should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct."

And, at page 17, the Court said:

"Our concern is with the fair administration of justice."

The applicability of these principles to the case at bar is clear.

Here, the clear import of Judge Boldt's initial statement from the bench during the motion for reduction of sentence proceedings (Exhibit 1), was that he had discussed the case with Judge Tolin both before and after the verdict, had become familiar with "Judge Tolin's views of the case," and "(f)rom that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed" (emphasis added). This, in and of itself, is sufficient to call for an inquiry into just what that *coram non judice* information was, so as to make sure that the defendant was afforded a hearing before a judge and in a tribunal to which he was entitled. Such an inquiry should be conducted before a judge whose conduct was not being inquired into, and such other judge should be the one to pass upon the import of the matter after seeing and hearing the participant as a witness.

But the matter became even more complex when, as it turned out, Judge Boldt caused changes to be made in his remarks for the official version of the transcript. In the second statement (Exhibit 3, p. 25), the time of the conversations between Judge Boldt and Judge Tolin is shifted to after the verdict (rather than before and after). The phrase "of the case" was ordered deleted and the phrase "after the verdict in this case" ordered inserted in lieu thereof. Moreover, the positiveness of Judge Boldt's assurance that Judge Tolin would have imposed more severe sentences is diluted by his ordering the word "would" stricken and the word "might" substituted therefor (Exhibit 1). Additionally, by directing the court reporter to excise completely from the transcript the words "From that," Judge Boldt altered the meaning because, with that phrase, it is clear that Judge Boldt was saying, in effect, that he had learned Judge Tolin's views from Judge Tolin. Even as changed, the statement in the transcript (Exhibit 3, p. 25) is still to the effect (1) that Judge Boldt had in mind Judge Tolin's views of the case, and (2) that he received those views from Judge Tolin by talking about them with Judge Tolin.

So again, and in addition, the inquiry as to just what occurred should have been conducted by a judge other than the one whose conduct is involved and whose testimony should have

been heard and seen by such other judge.

But the filing, *sua sponte*, by Judge Boldt of his affidavit (CT 30-32) after the 2255 motion was filed, and the use thereof made by Judge Boldt at the hearing, surely makes it completely manifest that Judge Boldt should have been a witness in the case and should not have presided over the proceedings. By that affidavit, Judge Boldt personally involved himself as a person and sought to explain and present the facts of the matter. In that affidavit, Judge Boldt asserted: That "Neither the matter of sentence, nor any evidence, procedure, issue or ruling involved in Cause #27973 CD was ever so much as mentioned to me or in my presence by Judge Tolin at any time or place" (CT 31), and that the "views" of Judge Tolin came to be known to him, Judge Boldt, or were "derived solely from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain each time I saw him during the trial" (CT 30).

And so, by *ex parte* and self-serving statements, and in response to the 2255 motion, Judge Boldt asserts that solely because of the appearance of another judge, that judge, in the course of a long trial, "was laboring under a heavy burden of concern and strain," he was able to (and did)

assure defendants, their counsel and the public "without any question whatever" that the sentences imposed "were more lenient than those Judge Tolin would (might) have imposed" (Exhibit 1; Exhibit 3, p. 25).

Surely these conflicts and variances should be resolved and they could only be resolved in the manner devised by Anglo-Saxon jurisprudence -- by questioning the witness whose statements are being examined in open court before a judge who is not himself involved in them.

The actual hearing at which appellant's counsel sought to bring forth the facts demonstrated that that occurred against which the Supreme Court had set its face in *In re Murchison, supra,* 349 US 133, 138. Here, as there,

> "the judge, whom due process requires to be impartial in weighing evidence presented before him, called on his own personal knowledge and impression of what had occurred . . . and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination."

Thus, when counsel for appellants Carbo and Sica requested permission to ask Judge Boldt some questions (RT 53), Judge Boldt required them to make an offer of proof (*ibid*). There-

upon appellants' counsel advised the Court (RT 55) that it was their desire that Judge Boldt answer the questions which had theretofore been made a part of the record in previous motion that Judge Boldt not preside at the hearing (Appendix B annexed hereto), the Court replied -- not as a witness, but as the Court (RT 57-58):

> "With respect to question 15 through 19, subdivisions a through g, I will say this, that it is my practice to review the transcript in proceedings similar to those which were had on July 17, 1964, in cause No. 27973-CD of this court, with a view of correcting grammar, correcting what I consider to be mistakes as to what was said, to eliminate repetition and to clarify precisely and exactly what my thought is. And it was for that purpose that I requested a copy of the transcript, for the purpose of doing that very thing.
>
> "The balance of the inquiries, the details that are indicated here, in my opinion, are, in the first place, incomprehensible and irrelevant to any inquiry before us.
>
> "All that I think it is necessary to say

on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding."

This was not, we submit, responsive to the questions which had been put, and certainly did not permit of the cross-examination which is deemed to be the appropriate method for bringing out facts before a court.

The incongruity and the "spectacle" (*In re Murchison, supra,* 349 US at 139) "of the trial judge presenting testimony upon which he must finally pass in determining (whether to grant or deny petitioner's motion)" (paraphrased from *In re Murchison, ibid*) is seen from this further colloquy by the judge (RT 58):

"Now, I want to make it plain that I could have made that statement solely on my affirmation as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete unqualified truth, I made it

> in affidavit form. That statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding."

To counsel's argument (RT 60-61) that the Court was "really . . . passing judgment upon your own statement," that a witness cannot say to a lawyer, "I have answered your question," that "only an impartial judge can say to a lawyer that his questions have been answered," and that "some other person (should) sit as judge over this matter as to whether your Honor's statement answers all of the questions which we seek to propound," the Court replied (RT 61): "I do not agree with you. I have already ruled on that matter previously, and I don't propose to hear you on it any further."

When appellants' counsel suggested (RT 61) to the Court, in connection with the offer of proof, that if Judge Boldt would permit himself to be questioned along the lines indicated in the written questions (Appendix B annexed hereto), "we expect to be able to demonstrate variances between (the three statements Judge Boldt had made)" and "inconsistencies and conflicts in those statements," but that (RT 62) "this is all we can offer to prove at this time because we do not know what's in your Honor's mind, and we don't know --," the Court

interrupted and said (*ibid*) (and we suggest this further demonstrates the error in Judge Boldt having presided at the hearing and in not having permitted himself to be a witness):

> "You do know what is in my mind because I have made a statement about it, that I in no manner whatever, at any time or place or under any circumstances in any manner whatever discussed any phase of the trial with Judge Tolin, either before or after verdict, or up until the time of his death. I have made that unqualifiedly on oath, and I now reaffirm it on my honor and integrity as a United States District Judge. And I simply cannot find any possible basis in the line of interrogation that you have indicated here that would lead to any other result or conclusion.
>
> "I make this most solemnly, and with a very, very heavy sense of obligation. I hold as high an office, in my judgment, as man is given to hold. And in the most solemn manner, and without any reservation whatever,

I am making this affirmation that I make.

"I need not have made it on oath, because I think the affirmation of a United States District Judge is more solemn than most affidavits that I have read."

And (RT 63):

" . . . And I make it so, and I make it out of the depth of my conscience, my experience, and my knowledge of what occurred. (Emphasis added.)

"And in my mind there is just no vestige of merit in your contentions, either of fact or in law, in this proceeding."

But, withal, the fact remains that appellant was deprived of the right to cross-examine and present in that way "what occurred." We submit that the very thing happened here that was condemned by the Supreme Court, again, in *In re Murchison, supra,* 349 US 133, paraphrasing therefrom (p. 139):

" . . . (petitioner's motion having been) heard before (Judge Boldt) the result (was both) that the (petitioner) (was) deprived of examining or cross-examining him (and there was) the spectacle of the trial judge presenting testimony upon which he must

finally pass in determining (whether to grant or deny petitioner's motion). In (both) event(s) the State (had) the benefit of the judge's personal knowledge while the (petitioner) (was) denied an effective opportunity to cross-examine. . . . "

"The chief function of our judicial machinery is to ascertain the truth" (*Estes v. Texas*, 381 US 532, 544). The denial of the right to cross-examine cannot be said to contribute to that objective. *Cf. Pointer v. Texas*, 380 US 400, 404. Judge Boldt should not have presided at the hearing; he should, however, have been a witness therein. And the presence of the former and the absence of the latter denied appellant due process and a fair hearing.

II

THAT THE SUCCESSOR JUDGE PASSED UPON APPELLANT'S MOTION FOR NEW TRIAL, THE JUDGE HAVING THERETOFORE RECEIVED INFORMATION *CORAM NON JUDICE* CONCERNING THE CASE, DEPRIVED APPELLANT OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Our argument here would be just the same as that made in the Carbo case. As we have heretofore stated, the cases are exactly alike, and we respectfully ask the Court to refer to

the Opening Brief of Appellant Paul John Carbo. We do hereby adopt the argument advanced under heading II therein as our argument here, in the interest of brevity. The argument with reference to this point will be found at pages 23 to 31, inclusive, of the Carbo opening brief.

III

THE ADMINISTRATION OF CRIMINAL JUSTICE MUST NOT ONLY BE FAIR, IT MUST GIVE THE APPEARANCE OF FAIRNESS

We do not believe that this proposition can be better stated than it was stated in

In re Murchison, supra, 349 US 133,

at page 136, where the Court says:

> " . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a

possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'"

Citing:

Tumey v. Ohio, 273 US 510, 532.

And continuing:

"Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Citing:

Offutt v. United States, supra, 348 US 11, 14.

As the great writer said, "Caesar's wife must be above suspicion."

Again, under this point, may we respectfully direct the Court's attention to the argument commencing on page 31 of the Carbo brief, where it commences, "In *Berger v. United States*, 255 US 22, 35-36," to the ending of the quotations and argu-

ment at the bottom of page 35, and do adopt this argument in support of our contention, as fully as if made herein, and to this end, we do ask the Court's indulgence.

CONCLUSION

The judgment below should be reversed.

This Court should order that the sentence previously imposed upon appellant and the order denying motion for new trial be vacated and set aside and that a new and different judge, other than the Hon. George H. Boldt, be appointed to pass upon the motion for new trial or, in the alternative and at a minimum, that a new hearing of the 28 USC 2255 motion be held and that said hearing be presided over by a judge other than the Hon. George H. Boldt.

We further pray on behalf of appellant Joseph Sica that justice would well be served by the granting of a new trial, in view of all of the foregoing, by this Court.

We further adopt and make a part hereof Appendix A and B attached to the Carbo brief, which are similarly attached hereto.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Appellant
Joseph Sica

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for the above-named appellant JOSEPH SICA, do hereby certify that I have examined the provisions of Rules 18 and 19 of the above-entitled Court, and that in my opinion the tendered brief on behalf of Joseph Sica conforms to all requirements.

DATED: OCTOBER 13, 1965.



Russell E. Parsons



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APPENDIX "A"

LIST OF EXHIBITS

No.	Identified	Received
Petitioner's 1	32	34
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APPENDIX "B"

SOME QUESTIONS WHICH COUNSEL FOR PETITIONER INTENDED TO PUT TO JUDGE GEORGE H. BOLDT AT THE HEARING ON PETITIONER'S MOTION PURSUANT TO 28 USC 2255

1. Did you have occasion to see Judge Tolin during any time in 1961?

2. Please state the date, and place of each such occasion, and who was present or were present.

3. Please state the conversation, if any, at each of such occasions.

4. Were any of these occasions at lunch?

5. On July 17, 1964, did you have in mind Judge Tolin's views of the case of *United States v. Carbo et al.*, No. 27973?

6. On July 17, 1964, did you have in mind Judge Tolin's views of the case before the verdict in the case?

7. On July 17, 1964, did you have in mind Judge Tolin's views of the case after the verdict in the case?

8. Did you and Judge Tolin talk about the case?

9. If so, when, where and in whose presence?

10. What was said and by whom?

11. What were Judge Tolin's views of the case, before the verdict, that you had in mind, on July 17, 1964?

12. What were Judge Tolin's views of the case after the verdict, that you had in mind on July 17, 1964?

13. What is the basis for your statement on July 17, 1964, that you could say and affirm without any question whatsoever that the sentences you imposed you believed to be more lenient than those that Judge Tolin would have imposed?

14. What was your belief, on July 17, 1964, as to what sentences Judge Tolin would have imposed:

As to defendant Carbo?

As to defendant Sica?

As to defendant Palermo?

As to defendant Dragna?

As to defendant Gibson?

15. Did you instruct, in July 1964, Court Reporter Samuel Goldstein to make any changes in the transcript of the proceedings of July 17?

16. What were those instructions?

17. Did you instruct the changes to be made because, in your opinion, the draft of the transcript submitted to you by Mr. Goldstein was inaccurate?

18. Did you, on July 17, 1964, make the statements as set forth in the transcript thereof, first submitted to you by Mr. Goldstein?

19. Please explain the reason for each of the following changes in the transcript ordered by you:

a. Deletion of the word "And" after the

phrase "or some remarks of Judge Tolin concerning it";

b. Deletion of the word "and" after the phrase "and quite often saw each other at lunch";

c. Deletion of the word "see" in the phrase "I had occasion to see Judge Tolin after the verdict in this case" and substituting therefor the words "talk with";

d. Deletion of the words "I had" in the phrase "and I had some ideas of his views of the case" and substituting therefor the word "received";

e. Deletion of the words "of the" from the phrase "and I had some ideas of his views of the case" and inserting in lieu thereof the words "after the verdict in this";

f. Deletion of the words "From that" in the phrase "From that I can say and affirm without any question";

g. Deletion of the word "would" in the phrase "than those that Judge Tolin would have imposed" and inserting in lieu thereof the word "might".

20. Is it your customary practice to form an impression, upon knowing that a fellow judge is presiding over a long criminal trial and appears to be laboring under a heavy burden of concern and strain, that therefore that judge will impose upon the defendants in such a case a severe sentence?

21. Have you ever formed such an impression under such

circumstances with respect to any judge, other than Judge Tolin in the instant case?

22. If so, please state the circumstances.

23. Have you, as a Judge of a United States District Court, ever labored under a heavy burden of concern and strain in a criminal case?

24. If so, have you, because of such burden, imposed severe penalties on defendants?

25. Did you labor under a heavy burden of concern and strain in the course of your duties as Judge in the instant case?

26. When you observed Judge Tolin, did you know that he had had at least two heart attacks, that he was suffering from agina pectoris, and that he was under a physician's care?

APPENDIX "C"

MOTION PURSUANT TO 28 USC 2255 TO VACATE AND SET ASIDE SENTENCE AND FOR OTHER RELIEF

In the United States District Court, Southern District of California, Central Division,

JOSEPH SICA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

Russell E. Parsons, Edward I. Gritz, Attorneys for Petitioner-Movant Joseph Sica.

Case No. 65-91-Boldt (Ancillary to No. 27973 CD).

Filed January 20, 1965.

COMES NOW Joseph Sica and moves the Court pursuant to 28 USC 2255:

(1) to vacate and set aside sentences heretofore imposed;

(2) to vacate and set aside order denying motions for new trial;

(3) to appoint a new and different successor judge (one other than Hon. George H. Boldt) pursuant to Rule 25, Federal Rules of Criminal Procedure to pass upon petitioner's motions for new trial;

(4) to grant a hearing and, as part of said hearing that Judge Boldt be permitted, *sua sponte*, to testify,

and/or invited to testify and/or directed to testify; and

(5) that a United States District Judge, other than Hon. George H. Boldt, be designated to pass upon the instant motion.

Said motion is made on the ground that petitioner was deprived of liberty without due process of law, in violation of the Fifth Amendment to the United States Constitution in the following respects:

(1) that Hon. George H. Boldt, the successor judge heretofore appointed pursuant to said Rule 25 after the death of Hon. Ernest A. Tolin, the judge who tried the case, received prior to his appointment, information *coram non judice* concerning the case pertaining to matters upon which he thereafter was to adjudicate, in motions for a new trial;

(2) that said successor judge relied upon said extrajudicially received information in exercising his function in passing upon said motions for a new trial; and

(3) the fact that said successor judge received such prior extrajudicial information was not disclosed by said successor judge, and was not known, to petitioner nor to his counsel until after petitioner had exhausted his right to appeal, including petition for writ of *certiorari* in the

United States Supreme Court; and the nature of such extra-judicial information has never been disclosed to, and is not now and never has been known to petitioner or his counsel.

Said Motion is based upon the Petition of Joseph Sica, the Memorandum of Points and Authorities attached hereto and upon all the records and files in this case.

DATED: January 20, 1965.

RUSSELL E. PARSONS &

EDWARD I. GRITZ

BY: RUSSELL E. PARSONS

Attorneys for Petitioner-Movant

APPENDIX "D"

OBJECTIONS TO JUDGE HONORABLE GEORGE H. BOLDT, U. S. DISTRICT JUDGE, PRESIDING AT THE HEARING IN CONNECTION WITH THIS MATTER, OR ACTING IN ANY MANNER

In the United States District Court, Southern District of California, Central Division.

JOSEPH SICA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

Russell E. Parsons, Edward I. Gritz, Attorneys for Petitioner-Movant Joseph Sica.

Case No. 65-91-BOLDT (Ancillary to No. 27973 CD).

Filed February 1, 1965.

COMES NOW petitioner and movant, Joseph Sica, and respectfully objects to the Honorable George H. Boldt, District Judge, presiding on the hearing of petitioner Sica's motion pursuant to 28 U.S.C. 2255 to vacate and set aside the sentence, judgment and for other relief which hearing is presently for February 2nd, 1965, at Los Angeles, California.

The grounds for said objections are set forth in the motion and verified petition of Joseph Sica, with Points and Authorities attached, and the affidavit of the Honorable George H. Boldt, United States District Judge, dated January

21, 1965, and filed herein, and upon motion to vacate order of January 22, 1965, filed by petitioner Paul John Carbo in case No. 65-40-Boldt, ancillary to No. 27973 CD, and said Carbo's Memorandum in support of motion to vacate order of January 22, 1965, setting cause for hearing, and all of the points and arguments in said memorandum set forth and the same, and all of the files and records in this matter are hereby made a part of this objection by reference, as fully as if set forth herein in detail.

DATED: at Los Angeles, California, this 1st day of February, 1965.

RUSSELL E. PARSONS &

EDWARD I. GRITZ

BY: RUSSELL E. PARSONS

Attorneys for Petitioner and Movant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

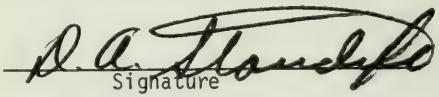
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on October 14, 1965, I served the within Opening Brief of Appellant Joseph Sica on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 1965, at Los Angeles, California.


Signature

Orig. & 20 copies:

Frank H. Schmid, Esq.
Clerk, U. S. Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101

DEAN-STANDEFER Multi Copy Service, 215 West Fifth Street, Los Angeles, California 90013 - MAdison 8-6898

NO. 20150

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 20150

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
For the Southern District of California,
Central Division.

REPLY BRIEF OF APPELLANT JOSEPH SICA

FILED
JAN 11 1966
WILLIAM E. WILSON, Clerk

RUSSELL E. PARSONS
448 South Hill Street
Los Angeles, Calif. 90013
MAdison 6-9167
Attorney for Appellant
Joseph Sica

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The government contends that the issue raised by the 2255 motions is so baseless as to approach the frivolous because we did not comply with Title 28 U.S. Code section 144	4
Ancillary to all of the foregoing is the fact that we were denied cross-examination of Judge Boldt, which came about in the following fashion	10
Ancillary to all of this is the fact that Judge Boldt elected to change the record in this case, concerning which we are making a portion of our argument here, on his own volition and without notice to any of counsel	12
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NO. 2 0 1 5 0

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
For the Southern District of California,
Central Division.

REPLY BRIEF OF APPELLANT JOSEPH SICA

TO THE HEAD JUDGE AND JUDGES OF THE ABOVE-ENTITLED COURT:

COMES NOW appellant Joseph Sica and files this his reply brief.

PRELIMINARY STATEMENT

Since the beginning of these proceedings, the respective counsel for Paul John Carbo and Joseph Sica have worked together, as these points urged apply to both petitioners and appellants; and we respectfully ask permission to adopt whatever arguments and legal authorities are set forth in the reply brief of the appellant Paul John Carbo as and on behalf of Sica.

The motions in the lower court were heard together, the court having said:

> "THE COURT: Does anyone else wish to be heard for movants? If not, Mr. Sheridan --
>
> "MR. PARSONS: If your Honor please, might I just say, your Honor only called the Carbo matter --
>
> "THE COURT: Oh, no. Both matters are being heard."
>
> (RT p. 11)

See also Reporter's Transcript page 47:

> "MR. PARSONS: May it be understood that this evidence all goes in as to the Sica petition, as well as Carbo? They have not been formally joined here for the purpose

of hearing, but in the interest of brevity --

"THE COURT: Oh, yes. Everything that goes in will be applicable to both petitions.

"MR. PARSONS: Thank you.

"THE COURT: And everything that is said will be applicable to both, unless it is clearly indicated otherwise.

"MR. PARSONS: Very well. Thank you."

The government has made a rather full statement of all prior proceedings in this case, and one gathers that indirectly they contend that by reason of the numerous proceedings, motions and appeal, these petitioners have had their "day in court," as was urged by government counsel at the hearing on the application for bail before this court.

We were unaware that Judge Boldt had talked with Judge Tolin about this case, until Judge Boldt so stated at the hearing on July 17, 1964. Therefore, we could not have raised any objection prior thereto.

ARGUMENT

I

THE GOVERNMENT CONTENDS THAT THE ISSUE RAISED BY THE 2255 MOTIONS IS SO BASELESS AS TO APPROACH THE FRIVOLOUS BECAUSE WE DID NOT COMPLY WITH TITLE 28 U.S. CODE SECTION 144.

May we point out that when Judge Tolin came to his untimely death and Judge Boldt was named as successor judge pursuant to Rule 25 of the Federal Rules of Criminal Procedure, the writer of this brief hardly knew Judge Boldt, except as a district judge from a northern state. We did not know he had ever talked to Judge Tolin about this case until he had heard the motions for new trial and motions for judgment of acquittal, had pronounced judgment, the case had passed through this court on appeal and to the Supreme Court of the United States by way of *certiorari*. As to Sica, on more than one occasion he denied bail. All this time, so far as the writer of this brief knows, he kept to himself the fact that he had talked to Judge Tolin about this case. He never should have accepted the assignment under Rule 25 of the Federal Rules of Criminal Procedure. How could we have proceeded then by way of Title 28 U. S. Code section 144? It is preposterous to urge that we could or should have done so.

Only until he elected to make the statement on the motion

to modify was it at all possible -- could we have jumped up then in court and urged he was biased and prejudiced under Title 28, section 144? The government counsel are not so naive as to urge that we could have done so.

Prior to hearing this proceeding, we asked that another judge be named to hear it. This was proper. He was about to be a witness. He had become a party to the proceeding, by filing an affidavit. And whether he was prejudiced or not was beside the issue at the moment. He was a party litigant.

He even denied petitioner Sica the right of cross-examination. What did Judge Tolin say to him in their conversation? What did they discuss about this case? Numerous questions were put to Judge Boldt by Mr. Wirin and by written inquiries, so there can be no question about the extent of our proposed cross-examination. But did Judge Tolin tell Judge Boldt that he knew Sica; that he had come across him in the course of his duties as a former Assistant United States Attorney and then as United States Attorney? We had a right to pursue the matter with Judge Boldt, and, as any cross-examiner with any experience knows, one question leads to another. Cross-examination is the most powerful weapon known to a trial lawyer, and the members of this court surely know it.

Our position was made clear to Judge Boldt, as it must be clear to this court, as shown by the record on the hearing pursuant to section 2255:

> "THE COURT: Well, I want you first to address yourself to the matter of the change of judge -- conclude on that subject.
>
> "MR. WIRIN: All right. But, your Honor, the point of my argument that a judge other than your Honor should preside over this hearing is that we feel the necessity of calling your Honor as a witness. And then the very next step in the chain of logic -- and that is what I am trying to do, is put together the links in this chain of logic -- is that it would be undesirable, that it would be improvident, that it would be inappropriate for your Honor to preside at a hearing in which your Honor is also a witness. So that your Honor is ruling then upon the relevancy or the competency or the propriety of questions which we seek to propound to your Honor.
>
> "We also think, your Honor, it would be undesirable, similarly, for your Honor to

preside when we are questioning Mr. Goldstein; because we intend to question him in connection with matters which pertain to your Honor, and which pertain to communications between him and your Honor.

"So let me then state my position now summarily and be done at least so far as this opening argument is concerned. Since we desire to call witnesses, one of whom is your Honor, it is our desire, and it is our motion, that someone other than your Honor preside over the hearing, at least at the time when that interrogation, or those interrogations, go forward.

"I think that hasn't stated my position fully. We really go beyond that. We really feel that if your Honor is to be a witness, then your Honor's testimony will have to be judged by someone; and that someone should not be your Honor, but should be some other judge.

"That is the thrust and the point of our motion, that your Honor call in another judge to preside over this hearing, and over all matters pertaining to the motion under 28 U.S. Code, Section 2255.

"THE COURT: Does anyone else wish to be heard for movants? If not, Mr. Sheridan --

"MR. PARSONS: If your Honor please, might I just say, your Honor only called the Carbo matter --

"THE COURT: Oh, no. Both matters are being heard.

"MR. PARSONS: Might I just briefly address your Honor?

"THE COURT: Certainly.

"MR. PARSONS: In the interest of brevity may I adopt the motion made by Mr. Carbo asking that your Honor ask for the appointment of another judge to hear these proceedings in their entirety. I filed a written objection, but I wish to supplement it now by an oral motion calling upon your Honor, if you will -- and with all due respect to your Honor -- to appoint, or, rather, to call in some other judge, or have some other judge named to hear these proceedings.

"THE COURT: It may be deemed that you have joined in the same motion, to the same effect, and that you have renewed all that you said in your written application.

"MR. PARSONS: Thank you, your Honor. And that I have made the same argument, in substance, that Mr. Wirin has made.

"THE COURT: Yes.

"MR. PARSONS: Thank you.

"And may I just say one thing in addition, just briefly. I am not, and cannot contend that you are prejudiced; and we have not pursued the usual form of attempting to disqualify you for the very reason we -- at least I am not able to. But if I might read a short paragraph from *In re Murchison*, 349 U.S. 133 at 136, which is in substance my argument, where that case says:

> ' . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . .

not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."'

Citing *Tumey v. Ohio*, 273 U.S. 510, 532.

'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."'

Citing *Offutt v. United States*, 348 U.S. 11, 14.

"As the great writer said, 'Caesar's wife must be above suspicion.'

"Thank you, your Honor."

(RT pp. 10 - 13)

ANCILLARY TO ALL OF THE FOREGOING IS THE FACT THAT WE WERE DENIED CROSS-EXAMINATION OF JUDGE BOLDT, WHICH CAME ABOUT IN THE FOLLOWING FASHION:

"MR. PARSONS: If your Honor please, may I adopt the arguments made, and the offer of proof made by Mr. Wirin on behalf of Mr. Carbo -- may I adopt them on behalf of Mr. Sica? And, with

all due respect and humility, your Honor, I do now ask permission to call the Honorable George H. Boldt as a witness in this case.

"THE COURT: The motion is denied.

"The request that you be deemed to have urged all that has been presented on behalf of counsel for Carbo is granted.

"MR. PARSONS: Very well. Thank you very much.

"May I point out this: In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case before my case was concluded, and received some ideas of his views after the verdict in this case. . .'

"It is my desire to question you about that conversation; where it took place, who, if anybody,was present, and what was said by either you or Judge Tolin at that time.

"THE COURT: The only conversation that I had with Judge Tolin after the verdict in cause No. 27973 is that which is related in my affidavit,

and the whole substance of the conversation is stated there. That is the only time that I saw Judge Tolin after the verdict was rendered in your case.

"MR. PARSONS: May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process of law.

"In all humility I say that to you as a lawyer.

"THE COURT: I do not agree, and your application is denied."

(RT pp. 65 - 66)

ANCILLARY TO ALL OF THIS IS THE FACT THAT JUDGE BOLDT ELECTED TO CHANGE THE RECORD IN THIS CASE, CONCERNING WHICH WE ARE MAKING A PORTION OF OUR ARGUMENT HERE, ON HIS OWN VOLITION AND WITHOUT NOTICE TO ANY OF COUNSEL.

We, of course, had obtained a copy of Judge Boldt's original remarks from the official reporter before he changed them. We are wondering what would happen to a clerk or to a lawyer appearing in a federal court who attempted to or caused an official record of actual remarks made in open court to be changed. No

judge has a right to do this without notice to counsel and their presence if they so desire. May we point out that changes made in a record amount to a denial of due process. In

Chessman v. Teets, 354 U.S. 156,

the court said, at page 162:

> "Under the circumstances which have been summarized, we must hold that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. (See: *Powell v. Alabama*, 287 U.S. 45, 68 . . . ; *Snyder v. Massachusetts*, 291 U.S. 97, 105 . . . [and other cases].)"

The court in *Chessman, supra*, went on to say:

> "All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand."

CONCLUSION

The judgment below should be reversed, and we respectfully renew the prayer as urged in our opening brief. At a minimum, the orders of Honorable George H. Boldt, judge presiding as successor judge, should be vacated and a new judge assigned to pass upon all of the subsequent proceedings after the death of Judge Tolin.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Appellant
Joseph Sica

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles California 90013, that on January 10th, 1966, I served the within REPLY BRIEF OF APPELLANT JOSEPH SICA on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10th, 1966, at Los Angeles, California.

Signature

Orig. & 20 copies:
Frank H. Schmid, Esq.
Clerk, U. S. Court of Appeals
For the Ninth Circuit
U.S. Post Office and Court House Bldg.
San Francisco, California 94101

DEAN-STANDEFER Multi Copy Service, 215 West Fifth Street, Los Angeles, California 90013 - MAdison 8-6898.

NO. 20150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 20150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant United States Attorney,

600 U. S. Court House,
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Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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NO. 20150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an appeal from an order, with findings of fact and conclusions of law, of the United States District Court for the Southern District of California, entered February 24, 1965, denying the appellants' motions to vacate sentence, to vacate the order denying motions for new trial, and for the appointment of a judge other than the Honorable George H. Boldt to pass upon motions for a new trial.

The jurisdiction of the District Court rested on Title 18, United States Code, Sections 371, 875(b) and 1951, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellants' "2255 motion" pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES

The following relevant sections are found in Title 28, United States Code:

"§144. Bias or prejudice of judge.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

"2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III

STATEMENT OF THE CASE

A. Prior History of the Case.

The following material concerning the extensive prior history of the case is taken chiefly from the Government's opposition to the 2255 motions filed with the District Court [Court Transcript 59-65]. 1/

The appellants, PAUL JOHN CARBO and JOSEPH SICA, and three co-defendants (Frank Palermo, Louis Tom Dragna and Truman K. Gibson, Jr.) were indicted variously in a ten-count indictment by the Federal Grand Jury for the Southern District of California, sitting at Los Angeles, on September 22, 1959. CARBO was charged in five counts alleging violations of 18 U.S.C. §§ 371, 875(b) and 1951; PALERMO was charged in six counts alleging violations of 18 U.S.C. §§ 371, 875(b), and 1951; SICA was charged in three counts alleging violations of 18 U.S.C. §§ 371 and 1951; and Dragna and Gibson were each charged in two counts alleging violations of 18 U.S.C. §§ 371 and 1951.

Extensive pre-trial proceedings were had including the entertaining by the District Court (the late Honorable Ernest Tolin, United States District Judge) of various motions by the said appellants and three co-defendants.

The beginning of the trial was substantially delayed by the unsuccessful efforts of CARBO to obtain an order quashing the writ

1/ Hereinafter referred to as "C.T.".

of habeas corpus ad prosequendum issued by the District Court to CARBO'S jailer in the City of New York.

Carbo v. United States, 277 F. 2d 433 (9 Cir. March 23, 1960), affirmed 364 U.S. 611 (January 9, 1961).

The trial commenced on February 21, 1961, at which time, on motion of the Government, the District Court (the Honorable Ernest Tolin) exonerated the bonds of the said appellants, CARBO and SICA, and of the co-defendants, Palermo and Dragna, and remanded them into custody in order to avoid interference by them with the orderly process of the trial. (Co-defendant Gibson was briefly committed to custody at the same time; however, the order committing Gibson was vacated by the trial judge the day it was entered.) While the trial was in progress, CARBO, Palermo, SICA and Dragna prosecuted two separate appeals in the United States Court of Appeals for the Ninth Circuit seeking to obtain reinstatement of bail prior to conviction. In the first of these appeals, this Court held that the District Court possessed the inherent power to commit the said appellants and co-defendants in order to maintain the orderly process of trial; however, this Court found that the brief record on the first day of trial did not justify the action of the District Court.

Carbo v. United States, 288 F. 2d 282 (9 Cir. March 3, 1961).

After additional evidence was adduced on the bail question in the District Court, the appellants CARBO and SICA and co-defendants

Palermo and Dragna were again denied bail by the trial court. This Court affirmed the decision of the District Court.

Carbo v. United States, 288 F. 2d 686 (9 Cir. March 15, 1961), cert. den. 365 U.S. 861 (March 27, 1961).

The trial concluded on May 30, 1961, following fourteen weeks of trial, with the jury finding the said appellants and co-defendants guilty as charged in the indictment.

After the verdicts were received, the District Court denied the pending motions of CARBO, Palermo, SICA and Gibson for judgments of acquittal and set hearing on all other motions, pending and to be filed, for June 20, 1961.

On June 11, 1961, Judge Tolin died. Thereafter, on June 26, 1961, Chief Judge Peirson M. Hall entered an order designating the Honorable George H. Boldt, United States District Judge for the Western District of Washington, to hear and dispose of any and all matters which remained to be disposed of in the case.

On July 24, 1961, Judge Boldt heard argument upon all pending post conviction motions and adjourned the case sine die for ruling thereon and for imposition of sentence (in the event the motions of the said appellants and co-defendants were denied) in order to have an opportunity to acquaint himself fully with the entire record in the case.

On October 13, 1961, Judge Boldt denied said appellants' and co-defendants' supplemental motions for new trial.

On November 28, 1961, Judge Boldt signed a Memorandum

Order setting forth his findings and tentative ruling with respect to the pending motions of said appellants and co-defendants. This Order invited all parties to submit further memoranda and oral argument if they so desired at or before the hearing on the motions, December 2, 1961.

On December 2, 1961, Judge Boldt heard further argument upon the pending motions, which motions were denied at the conclusion of argument. At this time, the District Court adopted the Government's Memorandum of Points and Authorities Concerning Certain Contentions of Error Raised by Defendants in Their Motions for New Trial "as being substantially and barring some possible suggestion of argumentation, a true analysis of the record" which conformed "entirely to my own views of it." In accordance with his Memorandum Order and his remarks in open court on December 2, 1961, Judge Boldt filed an Abstract of Testimony comprising ten volumes which summarized all of the trial proceedings. On the same date Judge Boldt sentenced the appellant CARBO to twenty years on Count One of the indictment, five years on Count Two, to run consecutively to the sentence imposed on Count One, and five years on each of Counts Five, Seven, and Nine to run concurrently with the sentences on Counts One and Three. The appellant SICA was sentenced to twenty years on Count One and five years each on Counts Four and Five to run concurrently with the sentence on Count One.

On January 22, 1962, this Court denied the motions of said appellants CARBO and SICA for bail pending appeal without prejudice

to renewal thereof after reconsideration of such motions by the District Court.

Carbo v. United States, 300 F. 2d 889 (9 Cir. January 22, 1962).

Upon reconsideration of his earlier denial of bail pending appeal, Judge Boldt again denied CARBO'S and SICA'S motions on February 5, 1962.

On February 13, 1962, this Court affirmed Judge Boldt's denial of bail pending appeal to CARBO and SICA.

Carbo v. United States, 302 F. 2d 456 (9 Cir. February 13, 1962).

On March 19, 1962, Mr. Justice Douglas denied bail to CARBO "in the public interest" and set bail for SICA in the amount of $50,000 with substantial limitations upon his conduct while at large.

Carbo v. United States, 82 S. Ct. 662, 7 L. ed. 2d 769 (March 19, 1962);

Sica v. United States, 82 S. Ct. 669, 7 L. ed. 2d 778 (March 19, 1962).

On February 13, 1963, this Court handed down its opinion relating to the merits of the various appeals (314 F. 2d 718, 9 Cir. 1963). Petitions for rehearing were denied on March 19, 1963 (314 F. 2d 718, 9 Cir. 1963).

The United States Supreme Court on June 1, 1964 denied petitions for certiorari (377 U. S. 953); and on June 22, 1964 denied petitions for rehearing of the petitions for certiorari (377 U. S. 1010).

When the mandate was issued, motions for modification of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure were made, opposed, briefed and argued; and on July 17, 1964 Judge Boldt denied said motions. As will be seen, appellants' entire subsequent motions under 28 U.S.C. §2255 were based upon a comment made by Judge Boldt at the conclusion of the hearing on these motions to modify the sentences.

Appellants SICA and CARBO, on July 23, 1964 and July 27, 1964, respectively, filed notices of appeal from the order denying the motions to modify sentences. In November, 1964, appellant SICA, acting in pro per, petitioned Honorable Thurmond Clarke for bail pending his appeal from the order denying his motion to modify his sentence. On December 16, 1964, appellant SICA, acting in pro per, wrote a letter addressed to Judge Thurmond Clarke inquiring about his motion for bail.

On December 8, 1964, the Government moved this Court to docket and dismiss the then pending appeals of CARBO and SICA. In December, 1964 appellant SICA, acting in pro per, addressed a motion to Circuit Judge Stanley N. Barnes in which he requested time to file a brief. In this motion appellant SICA stated:

> "Original 'Notice of Appeal' was instituted on July 23, 1964, by appellant's counsel in the said District Court. Said appeal was filed pursuant to a hearing had under Rule 35 Federal Rules of Criminal Procedure entitled 'Modification of Sentence.' (The contemplated appeal will not be for the purpose of questioning the

lower court's denial of the modification of sentence, but for the purpose of questioning certain prejudicial remarks made during the said hearing.).

"Thereafter appellant was transferred to his present place of confinement; Leavenworth, Kansas; the status of said appeal was unknown to appellant, assuming appellant's counsel was handling same accordingly. Upon receipt of said notice appellant was thereafter notified by counsel that the said question that was to be raised upon appeal, would be tested in the lower court under Title 28, USCA., Section 2255, which in effect would save time and expenses to both the appellant and the government.

"However, appellant seeks permission from this Honorable Court for an 'Extension of Time' to prepare a brief in the event the motion pursuant to 2255 should be unsuccessful and/or in the event the lower court has not the jurisdiction to entertain same."

On December 29, 1964, CARBO, through his counsel, advised this Court that he desired to withdraw his appeal. On January 4, 1964, the Court of Appeals for the Ninth Circuit in separate orders dismissed the appeals of SICA and CARBO. On the same date Judge Boldt in writing advised that he denied SICA'S application for bail.

B. Statement of Facts of 2255 Motions, Subjects of Instant Appeals.

On January 11, 1965, appellant CARBO, through counsel, obtained an order from Judge Thurmond Clarke setting a hearing, of CARBO'S as yet unfiled motion under 28 U.S.C. 2255, for January 25, 1965, in Courtroom Number 3 in Los Angeles, California. Then, such a motion under 28 U.S.C. 2255 was filed. Counsel sent a "courtesy copy" of the 2255 motion and a copy of the order setting a hearing to Judge Boldt. The District Court Clerk, pursuant to local rules, assigned the 2255 motion to Judge Boldt under case No. 65-40-Boldt.

On January 20, 1965, appellant SICA, through his counsel, filed three pleadings:

1. Motion Pursuant to 28 U.S.C. 2255 to Vacate and Set Aside Sentence and For Other Relief.

2. Motion and Petition Pursuant to Section 2255 of Title 28 U.S.C. to Vacate Judgment and Modify the Same Heretofore Rendered Herein as to Movant and Petitioner Joseph Sica.

3. Motion for Assignment of Judge. (This motion was addressed to Chief Judge William C. Mathes.)

On January 22, 1964, Judge Thurmond Clarke, noting that "pursuant to the established practice" that the 2255 motions of SICA and CARBO are assigned to Judge George H. Boldt for all further proceedings, continued the hearing to February 2, 1965 before Judge Boldt.

On January 22, 1965 an affidavit of Judge Boldt was filed in both cases; 65-40 Boldt (CARBO) and 65-91 Boldt (SICA).

On January 25, 1965, Chief Judge Mathes entered an order denying SICA'S motion for the assignment of a judge other than Judge Boldt.

On January 26, 1965, appellant CARBO, through his counsel, obtained an order from Judge Clarke shortening time to January 28, 1965, for a hearing before Judge Clarke on the following motions:

1. Motion to vacate Judge Clarke's order of January 22, 1965 setting the case, 65-40-Boldt, before Judge Boldt for hearing on February 2, 1965.

2. Motion that a Judge other than Judge Boldt hear case 65-40-Boldt.

The Government filed oppositions to these two motions. On January 28, 1965, Judge Clarke heard the above mentioned two motions, and at the conclusion of counsel's arguments, Judge Clarke orally denied each of the motions. On January 29, 1965 Judge Clarke signed a written order denying each of these motions.

The appellants' 2255 motions presented essentially identical claims to relief. The arguments presented may be summarized as follows.

At the hearing on the previously referred to motion to reduce sentence on July 17, 1964, an attorney representing one of the appellants' co-defendants stated:

" * * * and I personally had the opportunity of talking about this case to Judge Tolin, who is now

deceased, and I feel that your Honor, in the spirit that Judge Tolin would have treated this matter should grant this man probation and modify the judgment to cover the period of time * * * * " [C. T. 89].

Judge Boldt replied to this statement by saying:

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this, and before my case was concluded, and I had some ideas of his views of the case. From that I can affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed." [C. T. 80-81].

When a transcript of the judge's remarks was ordered by the appellants, the court reporter for the aforesaid hearing sent a copy of the transcript to Judge Boldt who returned it with changes as follows:

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~ I should say that I have pretty well in mind Judge Tolin's

views of the case, since we were operating at ~~the other~~ opposite ends of the same hallway during the same period and we quite often saw each other at lunch; ~~and~~ I had occasion to ~~see~~ talk with Judge Tolin after the verdict in this case, ~~and~~ before my case was concluded, and ~~I had~~ received some ideas of his views ~~of the~~ after the verdict in this case." [C. T. 81, lines 22 to 32].

"~~From that~~ I can ~~say and~~ affirm without any question whatever that the sentences I imposed~~, I believe,~~ were more lenient that those ~~that~~ Judge Tolin ~~would~~ might have imposed." (words deleted are crossed out, thus: ----, and words added are underlined, thus: _____.) [C. T. 82, lines 1-6].

In Judge Boldt's affidavit filed on January 22, 1965 [C. T. 30-32], the judge clarified his comments from the bench. The affidavit states that Judge Boldt felt that Judge Tolin considered the appellants' offense as extremely serious, not because of any statements made by Judge Tolin to him, but because of the fact that Judge Tolin had appeared to him during the time of the trial, like a man laboring under a heavy burden. Judge Boldt stated that his impressions of Judge Tolin's feelings played no part whatsoever in his rulings or the sentences he imposed, but that he relied solely on a meticulous consideration of the transcript. Judge Boldt added that he had not been a close acquaintance of Judge Tolin, that he had never met with Judge Tolin alone during the course of the appellants'

trial, and that he never had any conversation whatsoever with Judge Tolin concerning the evidence, rulings, questions of law, or possible sentence in the instant case.

The appellants' 2255 motions argued that contrary to Judge Boldt's sworn affidavit the possibility remained that Judge Boldt may have received some information from his predecessor on the case, and that such information would be "coram non judice", entitling the appellants to relief. The appellants also argued that the possibility of the above required that a different judge consider the 2255 motion and that Judge Boldt consent to being a witness at the 2255 hearing.

The hearing on the 2255 motions took place on February 2, 1965, before Judge Boldt. In the course of the hearing, counsel for the appellant CARBO admitted that the appellants had not complied with the requirements of Title 28, United States Code §144 in requesting the replacement of Judge Boldt [C. T. 5-6].

Judge Boldt heard lengthy argument by counsel for the appellants and the Government, which in large measure were repetitious of those matters previously presented in the pleadings. Judge Boldt then denied appellants' motions that he be disqualified [C. T. 29].

Only one witness testified at the hearing; namely, Samuel Goldstein, the court reporter who had recorded Judge Boldt's statement of July 17, 1964, concerning Judge Tolin's "views" toward sentence of the appellants and their co-defendants. Mr. Goldstein, subpoenaed by appellant CARBO, testified that he sent

a transcript of the July 17, 1964, proceedings to Judge Boldt pursuant to the judge's request. Shortly thereafter, Judge Boldt returned the transcript with the changes discussed above [Reporter's Transcript 30-52]. 2/

Following Mr. Goldstein's testimony, counsel for appellant CARBO requested the opportunity to address certain questions to the Court. These questions appear in Appendix B of both appellants' briefs. All the questions concerned Judge Boldt's July 17 reference to Judge Tolin's views. The Court examined the questions. Judge Boldt commented with respect to questions 15 through 19 that it was his practice to review transcripts for the purpose of correcting grammar, stenographic errors, eliminate repetition, and clarify his statements. Judge Boldt stated:

> "All that I think it is necessary to say on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding.
>
> "Now, I want to make it plain that I could have made that statement solely on my affirmation as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete and unqualified truth, I made it in affidavit form. That

2/ Hereinafter referred to as "R. T. ".

statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding.

"For these reasons I decline to be sworn as a witness, or to be interrogated further by you or any other counsel in the matter." [R. T. 58, lines 8-24].

Judge Boldt closed the hearing with a concise statement as to the merit of the 2255 motions.

"It appears to me indisputably shown that there is not the slightest basis in fact for the contentions made in the Carbo and Sica motions under 28 USC 2255. And I further find and hold that, assuming any possible interpretation of my July 17, 1964 remarks most favorable to petitioners' contentions, they are without merit and have no substantial basis in law.

"In my opinion these motions are so meretricious in both fact and law as almost to reach the point of being frivolous. The long delay in presenting these contentions casts some doubt upon their bona fides. No application for change of judge has been made or attempted in the only way authorized by law, namely, under 28 USC 144.

"In these circumstances and considering the vast amount of thought, time and effort expended in safeguarding the defendants' rights in this litigation -- a large part of

which was contributed by me, I dare to say, above and beyond the call of duty in some respects -- it is difficult to believe that the motions now presented are made in full candor and in good faith.

"In any event, each and all of the several contentions and the several motions in each of the Carbo and Sica petitions under 28 USC 2255 are now and hereby denied. It is so ordered.

"Recess, subject to call." [R. T. 75, lines 7-25; 76, lines 1-6].

On March 9, 1965, the Findings of Fact and Conclusions of Law and Judgment pertaining to the 2255 motions were filed [C. T. 79-85 (Carbo); 116-122 (Sica)]. The Conclusions of Law were stated as follows:

"1. There is no basis in fact and in law to disqualify Judge Boldt from ruling on petitioner's motion under 28 U. S. C. §2255.

"2. There is no basis in fact or in law to support this petition.

"3. The doctrine of coram non judice has no factual or legal application to this matter.

"That the petition must be denied." [C. T. 82-83; 119-120].

Thereafter the instant appeals were initiated.

IV

SUMMARY OF ARGUMENT

1. Since the doctrine of coram non judice has no factual nor legal application to the appellants' case, their claim for relief based on said doctrine is without merit.

2. The issue raised by the 2255 motions is so baseless as to approach the frivolous, since the appellants did not comply with the requirements of Section 144 of Title 28, United States Code, in regard to seeking Judge Boldt's replacement, and since under Section 2255 of Title 28, United States Code, Judge Boldt was the proper judge to consider the 2255 motions; therefore, the appellants' contention, that Judge Boldt's presiding at the 2255 hearing and Judge Boldt's declining to testify at said hearing deprived the appellants of due process of law, is without merit.

3. The record of the instant 2255 motions in the District Court does not contain any factors which can be considered to give even the appearance of unfairness to the appellants.

V

ARGUMENT

A. SINCE THE DOCTRINE OF CORAM NON JUDICE HAS NO FACTUAL NOR LEGAL APPLICATION TO THE APPELLANTS' CASE, THEIR CLAIM FOR RELIEF BASED ON SAID DOCTRINE IS WITHOUT MERIT.

The briefs for both appellants have approached the merits of the appeal in what would appear to the Government to be a totally illogical manner; namely, both briefs first present the arguments concerning the alleged deprivation of due process because of Judge Boldt's presiding at the 2255 hearing and the Judge's refusal to testify at the hearing, and only then do the briefs turn to the heart of the matter, the merits of the 2255 motions. It is only reasonable to first examine the only basic issue of the appeal, which, as previously stated, is the argument that Judge Boldt may have talked with Judge Tolin in regards to the case and that Judge Boldt may have received information coram non judice which he relied upon in his rulings and sentence, and that the appellants have therefore allegedly been deprived of liberty without due process of law. It is the Government's contention that the ancient maxim of coram non judice has no legal nor factual application to the instant case; that the appellants' claim for relief has no basis; and that because of this fact the questions of the replacement of Judge Boldt and calling the judge as a witness must be recognized as empty and meaningless.

According to Black's Law Dictionary (4th Ed. 1951, p. 406)

the phrase coram non judice means: "In presence of a person not a judge. When a suit is brought and determined in a Court which has no jurisdiction in the matter, then it is said to be coram non judice, and the judgment is void."

Several of the cases cited in the appellants' briefs (it is to be noted that the appellant Sica's brief adopts in toto the argument on this, the essential question, from the appellant Carbo's brief) appear to give the aforesaid phrase a different meaning, namely, "of extrajudicial origin". However, the phrase when so used is utilized to distinguish the difference between a personal bias and a judicial bias. Thus, if a judge has a point of view in a case that is derived from the evidence, then it is a judicial and not a personal bias.

There is not, however, any such equation in the law as that the appellants urge, to the effect that if a judge knows anything about the matter before him that was derived from sources outside the courtroom, he is automatically disqualified from sitting on the case. The appellants recognize that judges are treated differently in this area from jurors and that the courts have not felt that a judge requires the same degree of insulation from outside influences as the impressionable layman serving on a jury. The appellants have not, however, fully appreciated the real difference in the treatment of the courts in regard to judges and juries, a difference based on the extremely lessened need for active protection of a defendant's rights, because of the enormously lessened possibility that a judge would be influenced by outside sources, as

opposed to the possibility of a juror being influenced. As an example, it should be noted that to the knowledge of the Government, no case has ever been reversed because a trial judge was exposed to pre-judicial newspaper publicity, while numerous cases have been reversed because of the possible effect of newspaper publicity on jurors.

Assuming, for purposes of argument, that Judge Boldt did have an exchange of views with Judge Tolin concerning this case, there is no possibility of prejudice to the appellants since, as the record establishes Judge Boldt fully familiarized himself with the evidence in the case prior to denying the motions for a new trial and for reduction in sentence.

On December 2, 1961 in sentencing the appellants, Judge Boldt made a statement which sheds light on not only the efforts he made to inform himself as to the evidence in the case but also as to his basis for deducing Judge Tolin's feelings in regard to the case.

> "In that connection perhaps I should also say that Judge Tolin's immediate, prompt, emphatic denial of the motions for acquittal of all the defendants, except that of DRAGNA, within a very short time of the reception of the verdict and in the same session, and what he said at that time concerning pre-sentence reports and the like, coupled with my own analysis of the record in this case, makes it clear to me that Judge Tolin had not the slightest doubt of the guilt of any of the defendants, or of the

credibility of the principal witnesses, at least insofar as the particulars of the offenses charged in this case are concerned, and also that he had not the slightest thought or remotest intention of granting a new trial on a discretionary basis.

"The whole record and my own analysis of it reflects this, and I am utterly confident that were the late Judge Tolin sitting here now in this place instead of myself he would as readily, or perhaps even more readily, have denied all of the pending motions of the defendants.

"In all probability he would not have spent five months, as I have had to do, giving some part of almost every day of that time to the enormous task of reading, studying the record, analyzing it with respect to each and every specific claim of error made by the defendants.

"I say this without claiming any special merit for it, but I do say it with the utmost sincerity and on my honor as a United States judge, that every single point listed, however trivial, has been considered and examined with the result stated in my memorandum order of November 28th. . . . " [C.T. 70, lines 11-32; 71, lines 1-12].

This Honorable Court, in affirming the case, referred to Judge Boldt's steps taken to familiarize himself with the evidence.

"This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin 'had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witness.'

"In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseth received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

"We do not find abuse of discretion in the action of Judge Boldt in proceeding, as successor judge under Rule 25, to the completion of the judicial proceedings in the district court." [Carbo v. United States, 314 F. 2d 718 (9 Cir. 1963) at 750].

In the face of this record, the appellants do not contend that Judge Boldt relied to any great degree on information received directly from Judge Tolin, in making his rulings, but maintain that even if Judge Boldt was completely familiar with the evidence the fact that he heard his predecessor's views in a conversation outside the courtroom would serve to disqualify him and would deprive the appellants of due process. It should be noted that at no point do the appellants allege that Judge Tolin received any information extra judicially. Thus the only information that Judge Boldt could have possibly obtained from Judge Tolin would have been limited to the same material that appeared in the files and records of the case, independently examined by Judge Boldt, and Judge Tolin's opinions or views of the evidence. Judge Boldt could not have been exposed to any new evidence.

To apply the appellants' theory, particularly in the instant case, where neither Judge Tolin nor Judge Boldt was the trier of fact, would be to misconceive the nature and function of a judge and would be in total disregard of the weight to be given a judge's oath. It would also create a totally impractical situation requiring a revolution in the operation of our courts. Accepting the appellants' theory would apparently lead to the conclusion that if Judge Tolin had heard Judge Boldt's views on the case Judge Tolin would have been disqualified from further handling of the case. A judge would also be prohibited from discussing a case with his law clerk or with his own wife.

Needless to say, a judge will often have post-trial extra-

judicial sources of information at his disposal in sentencing a defendant, such as a probation officer's personal observations. In many instances, as in the present case, the trial court delays ruling on motions for a new trial until the day set for sentencing. The judge, on the day of his ruling on the motions for a new trial, will possess all the information in the probation reports, derived from extra-judicial sources, information vital to the determination of a proper sentence. Adoption of the appellants' position would obviously lead to an undesirable and impractical situation, cutting off such sources of information.

The Government maintains that the appellants have not cited one relevant case in support of their position. This statement is made despite the fact that the appellants' argument is loaded with numerous case citations. Close examination of the opinions in the cited cases reveals their total inapplicability.

The appellants quote certain language from In re Federal Facilities Realty Trust, 140 F. Supp. 522 (N. D. Ill. 1956) at page 25 of the Carbo brief. In this case, the judge in question had undertaken corporate reorganization and settlement proceedings and in connection therewith had determined that the appointed trustee should be surcharged. Later the same judge was required to adjudicate the division of gains. The trustee intervened, petitioning for a portion of the gains to be divided. The trustee then charged the judge by affidavit with prejudice and bias towards him. The affidavit was rejected by the same judge as insufficient in law to invoke the action contemplated by Section 144 of Title 28,

United States Code, since whatever opinions the judge had of the trustee were derived coram judice. It may therefore be seen that the factual situation and holding have no relevance to the instant case, except to the extent that it provides authority against the appellants, requiring compliance with Section 144. These aspects of the case will be discussed more completely under the second point of argument.

The case of Irvin v. Dowd, 366 U.S. 717 (1961), is also cited by the appellants [pages 25, 26, Carbo Brief]. In this case, the Supreme Court reversed a conviction on the basis that inflammatory newspaper publicity had deprived the defendant of a fair trial because of the possible effect on the jury. At no point in the opinion is there any reference to the possible effect of such publicity on the judge who supervised the trial of the case.

Craven v. United States, 22 F. 2d 605 (1 Cir. 1927), merely holds that a judge who presided at a trial, which ended in a mistrial (hung jury), was not prevented from presiding at the second trial, since any bias was not personal but judicial, i.e., derived from the evidence (coram judice) and not of extra-judicial origin (coram non judice). Again the case is, if anything, against the appellants in that the action was brought under the predecessor to Section 144 of Title 28, by affidavit of the defendant, as has not been done in the instant case.

The main case relied upon by the appellants and put forward by the appellants as most analogous to the present case is Smith v. United States, 360 U.S. 1 (1958).

This case involved application for vacation of sentence under 28 U.S.C. 2255. The defendants had originally waived venue, counsel, and indictment, and the Government proceeded against them by way of information charging interstate transportation of a kidnapped person. Prior to the entry of guilty pleas by the defendants, the judge had a private conference with the FBI agent who had interviewed the defendants immediately after their apprehension. The subject of the interview pertained to the question of possible sentence of the defendants.

The judgment and conviction were reversed with instructions to dismiss the information on the ground that the United States Attorney had no authority to file an information. The offense was said to require proceeding by indictment, therefore the waiver was not binding and did not confer power upon the trial court to hear the case.

Justices Clark, Harlan, and Stewart joined in a separate opinion -- concurring in part and dissenting in part. It was said that in a criminal case, a private conference by such an agent with the judge must be deemed presumptively prejudicial as a violation of Rule 32(c)(1), Federal Rules of Criminal Procedure. This rule provides that the presentence report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty. These justices invoked the rule of McNabb v. United States, 318 U.S. 332 (1943), stating that the court's duty of supervision required reversal of the conviction.

Even this separate opinion provides no support to the

appellants' position. The reasoning of the separate opinion indicates that the Justices joining in that opinion would not have objected to the trial court's receiving such information from an FBI agent after plea had been entered, although such information would be from an extra-judicial source. The critical factor under Rule 32(c)(1) is not the source of the material in question but the time when the information is received, namely before or after the verdict. The cases interpreting Rule 32 clearly hold that a judge is not barred from relying on probation reports in sentencing even though the defendant has not had the opportunity to examine the probation report.

> Friedman v. United States, 200 F. 2d 690 (C. A. Iowa, 1953), cert. den. 345 U. S. 926;
>
> United States v. Durham, 181 F. Supp. 503 (D. C. D. C., 1960).

The case of McFadden v. United States, 63 F. 2d 111 (7 Cir. 1933), also cited by the appellants involved a court trial in which the presiding judge, the trier of fact, received evidence, extra-judicially, of a conclusively incriminating nature. Since this evidence was received by the trier of fact apparently prior to the trial the reversal of the judgment is unremarkable. In the instant case, Judge Boldt was not the trier of fact, to note only one of the major differences between the cases.

The appellants cite Stewart v. United States, 366 U. S. 1 (1960). An examination of the facts and holding in this case can only result in complete mystification as to its inclusion in the

appellants' brief. In this case a defendant was undergoing his second retrial. His only defense was one of insanity. The defendant testified for the first time in this second retrial. On cross examination the prosecutor asked the defendant whether this was not his first time on the stand.

The conviction was reversed on the theory that the jury might have considered that the fact that defendant had not taken the stand before suggested the possibility that his meaningless testimony at the trial was feigned to deceive the jury into thinking defendant was in fact insane. The prosecutor's question was therefore held to be prejudicial, even though actual prejudice based on the inadmissible information was not capable of being shown.

The remainder of the cases cited by the appellants, including Tumey v. Ohio, 273 U.S. 510 (1927), involving a financial interest by the trier of fact in the outcome of the case, and Payne v. Arkansas, 356 U.S. 560 (1958), involving a jury's hearing evidence as to a coerced confession are equally irrelevant, and are so different from the instant case in their factual background and legal issues as to provide no support for the appellants' contentions.

Even if there were any basis for the legal theories suggested by the appellants, the fact remains that there is, contrary to the impression the appellants seek to create, no evidence that Judge Boldt ever received any information extra-judicially from Judge Tolin concerning this case. The unaltered transcript of Judge Boldt's comments from the bench on July 17, 1964, does not contain any reference to any such conversation concerning the case [C. T.

80, 81]. Needless to say, Judge Boldt's sworn statement of January 21, 1965, prepared after the Judge had the opportunity to scrutinize his memory as to his contacts with Judge Tolin, in which the judge flatly states that he never discussed the " * * * any evidence, procedure, issue or ruling * * * " involved in the present case and that any impression he had of Judge Tolin's views played no part in his rulings in the case should completely dispose of this issue [C. T. 31].

Since, as the lower court's judgment stated, the 2255 motions were supported neither in fact nor in law and since the doctrine of coram non judice has no application to this matter, the judgment of the District Court must be affirmed.

B. THE ISSUE RAISED BY THE 2255 MOTIONS IS SO BASELESS AS TO APPROACH THE FRIVOLOUS, SINCE THE APPELLANTS DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 144 OF TITLE 28, UNITED STATES CODE, IN REGARD TO SEEKING JUDGE BOLDT'S REPLACEMENT, AND SINCE UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, JUDGE BOLDT WAS THE PROPER JUDGE TO CONSIDER THE 2255 MOTIONS; THEREFORE, APPELLANTS' CONTENTION, THAT JUDGE BOLDT'S PRESIDING AT THE 2255 HEARING AND JUDGE BOLDT'S DECLINING TO TESTIFY AT SAID HEARING DEPRIVED THE APPELLANTS OF DUE PROCESS OF LAW, IS WITHOUT MERIT.

The only issue raised by the appellants' 2255 motions, the question as to the possibility of Judge Boldt's receiving information coram non judice from Judge Tolin has been examined in detail under the preceding section of the argument. For that reason, the Government's position will not be repeated at this point. In essence, if this Court accepts the Government's position, which was the view of the District Court, that this issue is so baseless as to approach the frivolous, the appellants' accompanying allegation of error concerning Judge Boldt's presiding at the 2255 motion, which derives its very existence from the coram non judice argument, must be considered as not worthy of independent examination. If this position of the Government is adopted, this secondary argument merely becomes a branch of a tree which has died. The branch has no independent existence of its own.

The position of the appellants is further untenable for the

reason that the motion to disqualify Judge Boldt, which was denied by Judge Boldt, was clearly insufficient in law.

In the first place Judge Boldt, as the successor to the trial judge, was the proper judge to consider 2255 motions made by the appellants. As the Court of Appeals for the Fourth Circuit pointed out in Carvell v. United States, 173 F. 2d 348 (4 Cir. 1949), in passing on a complaint that the trial judge should not have been the judge who passed on a 2255 motion, "It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that Section 2255 of Title 28 was inserted in the Judicial Code."

If the appellants felt there were circumstances in the instant case which made it inappropriate for Judge Boldt to hear the 2255 motion there was a precisely defined manner to bring the problem to the fore. The way in which this should have been initiated, the only way it could properly have been initiated, was to have followed the steps clearly outlined by Section 144 of Title 28, U. S. C. This statute, completely set out in the statute section of this brief requires that the defendant file with the District Court a detailed affidavit executed by that defendant stating the facts and reasons for the belief that bias and prejudice exists on the part of the judge. The statute also requires that the affidavit be accompanied by a certificate of counsel of record that the affidavit is made in good faith.

In the present case the files before this Court do not contain such affidavits made by the appellants Carbo and Sica, nor

certificates by their counsel. No such affidavits or certificates were ever filed in the District Court. The attorney for the appellant Carbo acknowledged at the 2255 hearing that Section 144 had not been complied with by either himself or his client [R. T. 5].

While Section 2255 and the cases interpreting it cover a great deal of territory, it is not the all encompassing umbrella that the plaintiffs would like to make it. Section 2255 is not the proper approach or procedure to disqualify a judge. The only authorized procedure to be utilized to disqualify a judge in Federal Court in Section 144. The cases demanding a strict following of the requirements of Section 144 are legion. As the Fifth Circuit stated in Beland v. United States, 117 F. 2d 958 (5 Cir. 1941) at 960: "The courts have held that compliance with its every provision is essential * * * * . The orderly administration of justice requires that affidavits filed under the statute be strictly construed so as to prevent abuse, and that they state facts, not baseless conclusions, showing personal bias or prejudice of the judge against the affiant."

See also:

Wilkes v. United States, 80 F. 2d 285 (9 Cir. 1935);

Hurd v. Letts, 152 F. 2d 121 (D. C. Cir. 1945);

United States v. Pendergast, 34 F. Supp. 269 (D. C. W. D. Mo. 1940).

In the instant case there is not even an affidavit to construe. There is a total and complete failure of compliance with the statute. If, however, the information contained in the 2255 motions had

been put in affidavit form and the other procedural steps of Section 144 had been complied with, the motion to relieve Judge Boldt would still have lacked merit, since there were no facts presented which would indicate the bias and prejudice on the judge's part which must be stated in order that the affidavit be sufficient.

Hurd v. Letts, supra.

Wilkes v. United States, supra.

Under Section 144, it should be noted, Judge Boldt would have had the duty to pass initially on the timeliness and sufficiency of the motion to disqualify him.

Willenbring v. United States, 306 F. 2d 944 (9 Cir. 1962);

Taylor v. United States, 179 F. 2d 640 (9 Cir. 1950);

Price v. Johnston, 125 F. 2d 806 (9 Cir. 1942).

Since counsel for the appellants are obviously familiar with existence of Section 144 and its requirements, it appears remarkable to the Government that there has at no time been even an attempt at compliance. Perhaps this strange void is due to a misconception of counsel as to the meaning of the terms bias and prejudice in their legal sense. Perhaps counsel for the appellants connote bias and prejudice with feelings of animosity, and recognizing that such animosity could not be established, disregarded Section 144.

If counsel for the appellants had closely examined one of the cases they cited in support of their own position, they would have realized the fallacy of such a notion. The appellants strongly

rely on the case of In re Federal Facilities Realty Trust, 140 F. Supp. 522 (N. D. Ill. 1956), a case which involves the claim that a judge received information coram non judice. As the opinion notes (at 526) if a judge actually determined a case not on the evidence, but on the basis of material received coram non judice, we would be presented with an example of the "personal prejudice" that the statute in question, Section 144, was designed to guard against. In such a situation (a situation as the appellants claim to exist in the present case) this decision indicates that Section 144 would be the proper and only avenue for the complaining party to take in order to obtain disqualification of the trial judge.

While one of the cases cited by the appellants actually provides this authority for the Government's position, the other cases cited in this assignment of error merely provide material useful only in refreshing one's memory as to areas of law not involved in the instant case. One of the two cases most strongly put forward is In Re Murchison, 349 U.S. 133 (1955), the noted contempt case involving the one-man-judge grand jury. In that case the Supreme Court was rightly disturbed by a situation where the judge was in effect the witness, the judge, and the jury. In Murchison, the judge who was the trier of fact, who determined the guilt or innocence of the defendant in regard to the contempt charge, was also the witness to the defendant's actions in a proceeding closed to the public, which were the basis for the contempt charge. Such a situation was so alien to the Court's sense of justice, to the spirit of our legal system, and to the basic require-

ments of due process that not even the broad powers of contempt allowed judges in our system could sustain such a conviction. How such a Star Chamber proceeding has any relevance to this case is not revealed by the appellants' argument.

The other case relied upon by the appellants is also from the contempt field; namely, Offutt v. United States, 348 U.S. 11 (1954). In that case, a trial judge held a defense counsel guilty of contempt even though the judge himself had displayed personal animosity and lack of judicial restraint. Under such circumstances, it was the view of the Supreme Court that the behavior of counsel could not be considered apart from the conduct of the judge. Therefore, the Court, in the exercise of its supervisory authority over the Federal Courts, set aside the contempt conviction and directed that the contempt charge should be retried before a different judge. It does not appear that the appellants contend that Judge Boldt conducted himself in a completely unjudicial manner as the judge in Offutt.

Again, examination of the facts and legal problems of the cases cited by the appellants establishes that the appellants' allegation of error is ill-founded, that the appellants were not deprived of due process, and that the judgment of the District Court should be affirmed.

C. THE RECORD OF THE INSTANT 2255 MOTIONS IN THE DISTRICT COURT DOES NOT CONTAIN ANY FACTORS WHICH CAN BE CONSIDERED TO GIVE EVEN THE APPEARANCE OF UNFAIRNESS TO THE APPELLANTS.

Appellants' briefs contain a third allegation of error, i.e., that an examination of the record of the proceedings before the District Court presents at least an appearance of unfairness to the appellants. This is not really an independent error, since its basis is the same as the preceding assignments of error, i.e., that since it is claimed Judge Boldt received information from Judge Tolin coram non judice, and since Judge Boldt did not disqualify himself, and did not consent to submit himself to examination by counsel for the appellants, the case has the appearance of unfairness to the appellants.

Insofar as this last assignment of error merely presents a repetition of the appellants' arguments on the other assigned errors, the Government will not repeat in detail the counter arguments presented previously.

The Government concurs in the appellants' view that the administration of justice must not only be fair, but must also present the appearance of fairness. The demands of justice and the cases cited in the opening briefs make this fact indisputable. The Government, however, strongly rejects the contention that there is anything about this case which presents even the appearance of unfairness.

Briefly, the appellants contend Judge Boldt received information from Judge Tolin. In order to find some support for this charge the appellants have seized on Judge Boldt's rather vague statements from the bench made at the time he denied the motions for reduction of sentence. The judge's remarks, examined under the earlier sections of this argument do not state that Judge Boldt discussed the facts of this case with Judge Tolin. Lest any doubt remained as to what occurred between the judges, Judge Boldt's sworn affidavit, previously discussed, emphatically states that not only did Judge Boldt not discuss the case with Judge Tolin, but that any opinion Judge Boldt may have received from Judge Tolin's appearance played no part in the successor judge's rulings.

In effect this Honorable Court is faced with an unsubstantiated charge in the coram non judice issue. From this frivolous allegation of error, the appellants developed the companion allegations of error including the charge that the District Court proceeding possessed the "appearance of unfairness". Since the appellants have intentionally and completely failed to comply with the provisions of Title 28, Section 144, the only avenue provided by law for seeking Judge Bold's disqualification, the District Court's determination of the issue cannot be considered to appear unfair. If anything, one's sense of patience is tried by such an attempt to build a molehill into a mountain in a desperate effort to obtain relief. Such an unwarranted and unbased attack on the District Court should be rejected by this Honorable Court.

VI

CONCLUSION

For the reasons stated, it is submitted that the District Court's order denying appellants' motions under Title 28, United States Code, Section 2255, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

/s/ ROBERT L. BROSIO
ROBERT L. BROSIO

NO. 20150

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FILED
JAN 10 1966
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Preliminary Statement

Appellee devotes considerable time recounting the previous history of the case. This, of course, is perfectly proper, but if by so doing, appellee seeks to convey the impression that the question before the Court on this appeal is, or could have been, raised or disposed of during that previous history, such is not the case. The first time appellant or his counsel knew, or had any reason to believe, that prior to his appointment as successor judge, Judge Boldt had discussed the case or that he had any knowledge of the case or Judge Tolin's views thereon, was after all the appeal procedures, including Petition for Writ of Certiorari in the United States Supreme Court, had been exhausted, and at the very end of

the motion for modification of sentence proceedings after the mandate had been returned to the Trial Court (CT 7). 1/

Appellee points out (Br. 15) that Judge Boldt in his affidavit stated that the views of the case he had referred to in his statement from the bench on July 17, 1964 were that Judge Tolin considered the offense extremely serious and that he got these views "from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain" and that "from such impression I believe Judge Tolin in all probability would have imposed heavier sentences than were fixed by me." (Exh. 1). To appellant, at least, these are but meaningless words; to say that one can look at a man and from the fact that he appeared to be laboring under a heavy burden deduce from that alone that he would have imposed a heavier sentence, is difficult to understand. And the Court foreclosed any inquiry into making it understandable and credible. The only explanation is that because judges are human, the trial judge here was emotionally involved in the situation, which is, of course, the reason for the rule that one should not sit as a judge on his own conduct.

1/ Sometimes, even though a court has passed upon a point in a case, it is necessary and proper that it pass upon it again, if it be convinced that it was in error in the first instance. (Chessman v. Teets, 354 U.S. 156, 165, 1 L.ed.2d 1253, 1260, 77 S.Ct. 1127). But that consideration is not involved in the case at bar. Appellant did appeal from the Trial Court's order denying modification of sentence (# Misc. 2165 in this Court), but withdrew that appeal (letter of Dec. 29, 1964), upon his counsel being convinced that the matter could not be reached in such an appeal but was properly presentable in a motion pursuant to 28 U.S.C. 2255.

Appellee points out (Br. 16) that "only one witness testified at the hearing; . . . the court reporter who had recorded Judge Boldt's statement of July 17, 1964, concerning Judge Tolin's 'views' " But, of course, there would have been more had the Trial Court permitted it, namely, Judge Boldt himself who had made the statement about Judge Tolin's views.

I

THE DOCTRINE OF CORUM NON JUDICE HAS APPLICATION HERE (Reply to Appellee's Point V, A, pp. 21-32)

Appellee's criticism (Br. 21) of the order in which appellant argued his case in his Opening Brief, is unwarranted. It is perfectly logical for a litigant who has been deprived of the opportunity to develop the facts in support of his case, to complain thereof at the outset, for the purpose of a hearing, included a hearing under §2255, is to develop the facts. "[A] hearing and only a hearing will elucidate the facts and assure a fair administration of justice." (Harris v. United States, ___ U.S. ___, 34 U.S. Law Week, Dec. 6, 1965). However, for ease in following the argument, appellant will adhere to appellee's format in replying to appellee's brief.

Appellant does not urge, as appellee suggests (Br. 22) he does, "that if a judge knows anything about the matter before him that was derived from sources outside the courtroom, he is automatically disqualified from sitting on the case." It is, of course,

a matter of what information the judge has received, from whom and how it was obtained, the circumstances thereof, etc. For example, it may well be that a judge may reject newspaper comment, much as he does incompetent and prejudicial evidence that is proffered in court. But can he, and will he, similarly purge from his mind what a judge who presides over a case tells him? A judge occupies a special status when he sits in a case and knows the whole thereof, and his remarks have greater impact and higher accreditation than would accrue from conversation or information from others.

Nor does appellant's contention mean that a judge who presides at a case should not talk or express his views to his wife, or his law clerk, a fellow judge or anyone else. Nor is it improper for such persons to listen to those views. The consequence of appellant's position is merely that when a judge presiding over a case has conveyed his views to a fellow judge in the, happily, rare instance when the first judge dies before having passed upon a motion for new trial, that fellow judge should not sit on the motion for new trial. The effect of this position imposes no difficulty on the administration of justice. Any one of the more than 300 other District Judges could sit on the case.

It must be remembered that a judge passing upon a motion for new trial is sitting as a 13th juror, 2/ and that a defendant is

2/ Applebaum v. United States, 274 F. 2d 43, 46 [CCA 7 1921]; see also, Rees v. United States, 95 F. 2d 784, 791 [CCA 4 1938] and Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216, 91 L. ed. 849, 852, 67 S. Ct. 752: "Determination of whether a new trial should be granted ... calls for the judgment in the first (Continued)

entitled and expects that he will exercise that function corum judice.

Appellee points out (Br. 23) that Judge Boldt familiarized himself with the evidence in the case. But appellant does not know whether Judge Boldt acted from the evidence or from Judge Tolin's views. When he first made the statement on July 17, 1964, Judge Boldt did not say that "from the record" he could affirm that his sentences were more lenient than those Judge Tolin would have imposed. He said (Exh. 1) "from that", namely, from the fact that he "had occasion to see Judge Tolin after the verdict in this case ... and I had some ideas of his views of the case", that he could so affirm. Had Judge Boldt said, or had the fact been (a matter upon which appellant was denied the opportunity to present evidence), that Judge Boldt's views came from Judge Tolin's views as expressed in the record, we would have a different case.

The quotation (Appellee's Br. 23-24) of what Judge Boldt said at the time of sentencing refers to the record of the case; this appellant understood. But Judge Boldt was not then, or at least he did not disclose that he was, speaking of matters derived from Judge Tolin outside the record of the case. Similarly, the quotation (Appellee's Br. 25) of what this Court said in affirming the conviction, refers to matters Judge Boldt obtained corum judice

2/ (Continued): instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcription can impart. ... Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone ..."

-- the words of Judge Tolin as expressed in the record. But after the case was all over, appellant learned for the first time that there were matters off the record communicated to Judge Boldt; precisely what, appellant does not know; Judge Boldt refuses to tell.

Appellee is incorrect in its statement (Br. 26) that appellant does not contend Judge Boldt relied on information received directly from Judge Tolin in making his rulings. Appellant, admittedly, does not know. But the reason for this is that Judge Boldt prevented him from presenting the facts, would not state what they were and sat in judgment over his own conduct.

As we have previously sought to make clear, appellant is not contending, as appellee seems to assert he does (Br. 26), that a judge would be prohibited from discussing a case with his law clerk or his wife. Moreover, the analogy is twisted. There is no likelihood that a law clerk or a wife would be passing upon a motion for new trial after having received the views of the judge. And in the rare instance, if one should occur, that subsequent to obtaining the views of the judge, that judge should die and the law clerk or wife should be appointed judge, he or she ought not pass upon the motion for new trial.

The fact that at the time of sentencing the judge has before him a probation report which contains material outside the record of the trial does not detract from appellant's contention. The matter of sentencing is a far different thing from passing upon a motion for new trial where the judge, sitting as a thirteenth juror, passes upon weight, sufficiency, credibility etc. See supra, pages

4 and 5, footnote 2.

It is true that often the judge passes upon a motion for new trial at the same session set for passing of sentence. But the judge knows that statements in a probation report are the work of the probation officer; they do not carry the same accreditation as the statements of a fellow judge who sat in the case. Moreover, it may well be -- and although not necessary for the decision in this case, the fact that this case arose and appellant's argument is being made to this Court, may furnish an opportunity for this Court to so declare -- that the procedure of the Court having and considering the probation report before passing upon a motion for new trial, should be re-examined. This, for the very reason of insuring that the motion for new trial will be based only upon the record.

As is evident, appellant disagrees with appellee (Br. 32) that the filing by Judge Boldt of his affidavit completely, or at all, disposes of the issue. That affidavit raised further factual problems, the effect of which should have been decided by a different judge in a proceeding wherein Judge Boldt would testify as a witness.

II

THIS IS NOT A 28 U.S.C. 144 CASE (Reply to Appellee's Point V, B; pp. 33-38).

Appellee misapprehends the point being made by appellant. Appellant does not contend that the judge who presided at the trial, or even a successor judge who presided at the motion for new trial, is not, ordinarily, the appropriate judge to pass upon a §2255 Motion. Nor does appellant contend that this is a case that involves the bias and prejudice of a judge. This is a case where, because of facts which appear on the record, it is necessary for the judge who presided at the motion for new trial to be a witness and, therefore, it is improper for that judge to preside at the hearing where rulings as to his own conduct have to be made.

Accordingly, none of the cases appellee cites (pp. 35-36) as to the sufficiency of affidavits under 28 U.S.C. 144 is in point. The problem is not one of bias or prejudice, but is concerned with the basic truism, a truism which, as appellant has pointed out in his Opening Brief, is bottomed on the Constitution and due process of law, that one cannot be a judge in his own case.

Appellee is incorrect in its assertion that (Br. 36-37) In re Federal Facilities Realty Trust, 140 F.Supp. 522 (N.D. Ill. 1956), is authority for the proposition that §144 must be followed in a case such as at bar. Presumably, appellee is referring to the sentence immediately following the sentence quoted by appellant at page 25 of his Opening Brief, namely, that "[t]he

latter type determination (attitudes and conceptions that have their origins in sources beyond the four corners of the court room) is the 'personal prejudice' that the statute guards against; the former type determination (derived from evidence and lengthy proceedings in court) is not." But the Court there was not laying down any all embracing rule of procedure, and it certainly was not passing upon a fact situation where the judge was required to be a witness in the case. All the Court was saying, and all it could be saying from the fact situation in that case, is that determination by a judge from the record of the case, cannot be the subject of an affidavit of prejudice.

But even if appellant is incorrect in his contention that he need not have followed the §144 procedure in order that the issue be presented as to whether Judge Boldt should, at the beginning, preside at the hearing on the §2255 Motion, the matter should be remanded to afford appellant the opportunity to follow that procedure. But, again on the assumption that appellant initially should have followed §144, remand for that purpose is not necessary because it became abundantly clear as the hearing progressed and when Judge Boldt refused to permit himself to be called as a witness and precluded appellant from developing the facts (RT 53-66), that it was improper for him to go forward, pass upon his own conduct and thereafter render judgment in the case. At that point, at least, during the proceedings, the unfairness of the "spectacle" (In re Murchison, 349 U.S. 133, 139, 90 L.ed. 942, 948, 75 S. Ct. 623) was manifest.

III

THE PROCEEDINGS BELOW BOTH WERE AND GAVE THE APPEARANCE OF BEING UNFAIR (Reply to Appellee's Point V, C; pp. 39-40). 3/

With due respect, appellant disagrees with appellee's assertion that the proceedings in the District Court did not "give even the appearance of unfairness." One cannot, we submit, read the record (RT 53-66) without coming to the contrary conclusion.

Appellee's assertion (Br. 40) that because Judge Boldt filed an affidavit, that ends the matter, demonstrates the incorrectness of its view. It is that affidavit which itself is involved in the question; it presented a different picture from either of the two previous statements of the judge; it called for inquiry and explanation, not ex parte but in the normal manner of a court inquiry. This was not what occurred; it should have. 4/

3/ In addition to the cases cited in appellant's Opening Brief, pp. 31-35, see also the recently decided Rapp v. Van Dusen, 350 F. 2d 806, 812 (CA 3 1965).

4/ Cf. Draper v. Washington, 372 U.S. 487, 498, 9 L. ed. 2d 899, 907, 83 S. Ct. 774.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

NO. 20150

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO and
JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

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APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED
SEP 29 1965
FRANK H. SCHMID, CLERK

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 28 USC 2255, this being a proceeding to vacate and set aside sentences theretofore imposed in a criminal case, and for other relief pursuant to that section. (CT 2) 1/

This is an appeal from the judgment denying relief entered on March 9, 1965 (CT 85). Notice of appeal was filed on March 31,

1/ The record certified to this Court consists of the Clerk's Transcript (CT), the Reporter's Transcript of the hearing below (RT) and three exhibits, in accordance with Rule 18(2)(f) of this Court, the list of exhibits is set out as Appendix A hereto.

1965 (CT 87).

This Court has jurisdiction of the appeal under said 28 USC 2255 and under 28 USC §§1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

After there had been jury verdicts of guilty, but before sentence and while there were pending motions for new trial, Hon. Ernest A. Tolin, the judge who had tried the case, passed away. (CT 5-6). Pursuant to Rule 25, Federal Rules of Criminal Procedure, Hon. George H. Boldt was designated as successor judge. (CT 6) Thereafter, defendant in the criminal action, petitioner and appellant here, and hereinafter designated as petitioner, filed a supplemental motion for new trial urging that pursuant to Rule 25 the successor judge could not perform the duties required of him in passing upon the motions for new trial because credibility and conflict of evidence questions were among the issues in said motions, which issues the successor judge was in no position to resolve, he not having presided at the trial, and, accordingly, under the Rule, a new trial should be granted. (CT 6)

The supplemental motion was denied, the motions for new trial were denied and petitioner was sentenced. (CT 6) On appeal, this Court affirmed (CT 5; 314 F. 2d 718) and the United States Supreme Court denied certiorari (CT 5; 377 US 953).

Following the return of the mandate upon denial of certiorari, petitioner timely filed, pursuant to Rule 35, Federal Rules of Criminal Procedure, a motion for modification of sentence which duly came on for hearing before the District Court, Judge Boldt presiding. (Exh. 3) At the time of the hearing of the motion, after counsel for petitioner and the other defendants who had made similar motions had made their arguments, and during the time Judge Boldt was announcing his ruling denying the motions, Judge Boldt said (RT 38-39; Exh. 1):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this case, and before my case was concluded, and I had some ideas of his views of the case. From that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed."

This was the first time petitioner or his counsel knew or had any reason to believe that prior to his appointment as successor judge, Judge Boldt had discussed the case with Judge Tolin or that he had any knowledge of the case or Judge Tolin's views thereon.

(CT 7)

Following the conclusion of the hearing on the motion for modification of sentence, Judge Boldt instructed the Court Reporter, Samuel Goldstein, not to deliver to counsel the reporter's transcript of the proceedings until after Judge Boldt had seen his remarks. (RT 35-36) Accordingly, Mr. Goldstein submitted to Judge Boldt a verbatim transcript of the proceedings (RT 34, 38, 39, 41) and, pursuant to the Court's instruction, did not deliver copies to counsel. (RT 36-37) After he received the transcript from Mr. Goldstein, Judge Boldt made changes thereon in his own handwriting (RT 34; Exh. 1) and instructed Mr. Goldstein to rewrite the transcript to read as changed before filing the original or releasing copies. (Exh. 2)

The transcript thereafter received by counsel from the court reporter (RT 36) read, as changed per Judge Boldt's instructions (RT 39, 41; Exh. 3, pg. 25), as follows: (words deleted are crossed out, thus: ----, and words added are underlined, thus: _____):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~ I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at ~~the other~~ opposite ends of the same hallway during the same period and ~~we~~ quite often saw each other at lunch~~;~~ . ~~and~~ I had occasion to ~~see~~ talk with Judge

Judge Tolin after the verdict in this case, ~~and~~ before my case was concluded, and ~~I had~~ received some ideas ~~of~~ his views ~~of the~~ after the verdict in this case. ~~From that~~ I can ~~say and~~ affirm without any question whatever that the sentences I imposed, ~~I believe,~~ were more lenient than those ~~that~~ Judge Tolin ~~would~~ might have imposed."

Subsequent thereto, petitioner filed this proceeding under 28 USC 2255 (CT 2) on the grounds that (CT 3) he had been denied due process of law in violation of the Fifth Amendment to the United States Constitution in that (1) the successor judge had received prior to his appointment information coram non judice concerning the case pertaining to matters upon which he was thereafter to adjudicate in motions for new trial, (2) the successor judge relied upon such information in exercising his function in passing upon the motions for new trial, and (3) that these facts were not known to petitioner or his counsel until after petitioner had exhausted his right to appeal including petition for writ of certiorari in the United States Supreme Court.

In his §2255 motion, petitioner asked (CT 2, 3) that a United States District Judge other than Judge Boldt pass upon the §2255 motion, that Judge Boldt be a witness at the hearing of the §2255 motion, that the sentences previously imposed be vacated and set aside, that the order previously made denying petitioner's motions for new trial be set aside, that a different successor judge, other than Judge Boldt, be appointed pursuant to Rule 25, Federal

Rules of Criminal Procedure, to pass upon petitioner's motions for new trial. All of these were denied petitioner (CT 75-76, 78, 95; RT 76).

Prior to the hearing on the §2255 motion, after learning that Judge Boldt had been assigned to hear the motion, petitioner moved that another judge be appointed. (CT 33-44) This motion was denied. (CT 56-58)

Also prior to the hearing on the §2255 motion, Judge Boldt, sua sponte, filed an affidavit setting forth a version different both from what he had said from the bench during the motion for modification of sentence proceedings and as he had had the reporter's transcript changed and setting forth an explanation. (CT 30-32)

At the hearing of the §2255 motion, although advised by counsel for petitioner (RT 9-10) that it was their desire to call him, Judge Boldt, as a witness in the proceedings (because the Judge's statement from the bench in the motion for modification of sentence hearing, and the changes in the reporter's transcript made thereof and the Judge's affidavit concerning said statement furnished a basis therefor), and that questions would be asked of Mr. Goldstein, the court reporter, concerning communications between the two of them (RT 10), Judge Boldt refused to permit another judge to hear the motion (RT 29).

During the hearing on the motion, Judge Boldt refused to permit himself to be called as a witness (RT 58, 65) or to be interrogated concerning the matter (RT 58, 63, 66) and, after

making a statement as to certain questions counsel had proposed to ask him (RT 57-58), ruled that the affidavit he had filed "fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding." (RT 58) When counsel urged that the Court was denying the right to cross examine an important witness which is essential to due process of law (RT 66), the Court replied, "I do not agree, and your application is denied." (ibid) When counsel, pursuant to the Court's order that an offer of proof be made (RT 53), offered to prove, if the judge would submit to questioning that there were variances, inconsistencies and conflicts in the various statements the judge had made and that was all they could offer at this time "because we don't know what is in your Honor's mind," (RT 62), the Court interrupted and replied (ibid), "You do know what is on my mind because I have made a statement about it."

On the merits of the §2255 motion, the Court denied any relief. (RT 26) Hence this appeal.

Questions Involved

1. Is due process of law denied where the only witness to the events giving rise to a claim for relief under 28 USC 2255 presides as judge at the hearing which was brought for the precise purpose of obtaining a judicial determination as to whether the conduct of the witness denied due process and a fair trial at a previous proceeding and where the said only witness is not allowed to be

called or sworn as a witness nor allowed to be cross-examined?

This question was raised in the §2255 motion itself (CT 2-3, 23-24) and by written motion addressed to the Chief Judge or Acting Chief Judge of the Court below, prior to the hearing of the §2255 motion immediately upon it being known to counsel for petitioner that the hearing on the §2255 motion had been assigned to the very judge whose conduct was the subject of the §2255 motion. (CT 33-44) This motion was denied. (CT 58) The question was likewise raised by written motion addressed to the said judge whose conduct furnished the base for the §2255 motion and to whom the said §2255 motion had been assigned for hearing. (CT 75-76) The motion was denied. (RT 29) The question was also raised during the hearing on the §2255 motion when the witness, who was then presiding as judge, was called as a witness (RT 53, 65) but who refused to be sworn or interrogated. (RT 58, 63, 65, 66).

2. Is a defendant in a criminal case denied due process of law and a fair trial on his motion for new trial where the judge who was assigned to hear the matter as successor judge under Rule 25, Federal Rules of Criminal Procedure, prior to his assignment and unknown to the defendant or his counsel, obtained information coram non judice upon which he relied in exercising his function as successor judge?

This question was raised by the motion pursuant to 28 USC 2255 (CT 2-25) and the oral procedings held thereon. (RT 30-76)

SPECIFICATIONS OF ERROR

1. The Trial Court erred in denying appellant's motions that a judge other than the Hon. George H. Boldt preside at the hearing of appellant's motion made pursuant to 28 USC 2255 and in allowing Judge Boldt to preside at the hearing of said §2255 motion;

2. The Trial Court erred in not requiring the Hon. George H. Boldt to be sworn as a witness and to testify at the hearing of appellant's motion made pursuant to 28 USC 2255.

The evidence sought to be elicited from Judge Boldt as a witness were answers to the questions (CT 42-44; RT 55, 61) set out in Appendix B hereto and incorporated herein as though fully set forth, and answers to such further questions as would appear appropriate depending upon the answers to the specific questions put. (RT 55)

In objecting to the refusal of Judge Boldt to be sworn as a witness or to answer the questions, counsel for petitioner urged (RT 59-61):

> "MR. WIRIN: Your Honor has said, and I haven't the slightest doubt but what your Honor has said in good faith, that your Honor is of the view that the statement which your Honor made under oath disposes of or answers the portion of the questioning to which your Honor has referred."
>
> "MR. WIRIN: But, of course, your Honor, it is a matter about which there might be honorable differences of opinion." . . .

"MR. WIRIN: For instance, we who are sitting at the counsel table, and who are advocates -- not judges but advocates -- may have a point of view that precise interrogation, indeed cross examination, often brings to light that which otherwise is not illuminated.

"Now then, your Honor, so there may be difference of opinions, your Honor, between judge and counsel; and counsel could in good faith believe that by questioning a person who has made a statement, they can bring out matters which are not as clear to them as it appears to be to the person who made the statement . . ."

(MR. WIRIN): " . . . Shouldn't the judgment as to whether or not counsel should have the right to interrogate your Honor in connection with the statement which your Honor made under oath, which your Honor now says covers and answers adequately all of the questions pertaining to that statement which we seek to propound, shouldn't a person of a different mind than your Honor, and other than your Honor, make that judgment, rather than your Honor who, whether you like it or not, perforce, of necessity and circumstance, really is passing judgment upon your own statement. And you are saying, 'My statement' -- you are saying what a witness would say to a lawyer. 'I have answered your question.' But the witness can't say that to a lawyer. Only an impartial judge can say to

a lawyer that his questions have been answered.

"So your Honor, it seems to me, ought to, with the graciousness and humility which becomes a judge of the United States District Court, let some other person sit as judge over this matter with respect to the question as to whether or not your Honor's statement answers all of the questions which we seek to propound."

Counsel for co-petitioner stated[2/] (RT 65-66):

"MR. PARSONS: ... In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case before my case was concluded, and received some ideas of his views after the verdict in this case ...'

"It is my desire to question you about that conversation; where it took place, who, if anybody, was present, and what was said by either you or

2/ The Court had previously ruled (RT 47) that "(e)verything that goes in will be applicable to both petitions. ... And everything that is said will be applicable to both, unless it is clearly indicated otherwise."

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2/ The Court had previously ruled (RT 47) that "(e)verything that goes in will be applicable to both petitions. ... And everything that is said will be applicable to both, unless it is clearly indicated otherwise."

Judge Tolin at that time."

Upon the Court's refusal to so permit, counsel stated (RT 66):

> "May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process of law." . . .

To which the Court replied (ibid):

> "I do not agree, and your application is denied."

3. The Trial Court erred in denying appellant's 28 USC 2255 motion, and each part thereof.

ARGUMENT

Summary of Argument

Petitioner was denied due process of law and a fair hearing both at the motion for new trial proceedings in the criminal case and in the 28 USC 2255 proceedings filed upon his learning of the defect in the motion for new trial hearing.

As to the former, petitioner contends that it is a denial of due process for a judge to preside at a matter as to which he had received, unbeknownst to the defendant, information coram non judice.

As to the latter, the 2255 proceedings, petitioner contends that where the only witness to what that information coram non

judice is, is the judge who presided at the hearing, who has, by causing changes to be made in the reporter's transcript, made two different versions of the matter and who thereafter, in response to §2255 proceedings, makes still a third and different statement as to what occurred, that that judge should not preside at the 2255 hearing and should be a witness therein. Petitioner argues that his hearing presided over by said judge and the judge not having permitted himself to be a witness or to be cross-examined, denied to him due process of law and, additionally, that for considerations of the fair administration of justice, such a proceeding should not be permitted to stand.

I

PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS §2255 HEARING IN THAT THE PROCEEDING WAS PRESIDED OVER BY THE JUDGE WHOSE CONDUCT WAS THE SUBJECT OF THE §2255 MOTION AND IN THAT SAID JUDGE WAS NOT PERMITTED TO BE SWORN AS A WITNESS, NOR TO TESTIFY NOR TO BE CROSS-EXAMINED.

"No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." (Re Murchison, 349 US 133, 136) This principle would appear to be so engrained in the law and in the Constitution as not to require discussion. The reason is manifest. In Murchison, supra, where a one-man-judge-grand jury heard the matter of an alleged contempt for what had occurred in the one-man grand jury investigation, the Court said (349 US at 138-139):

"As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than the testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. ... Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

" ... There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge. If there had been they might have been able to refute the judge's statements about White's insolence. ... If the charge should be heard before that judge, (the one-man grand jury one) the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determing the guilt or innocence of

the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. ..."

Similarly, in Offutt v. United States, 348 US 11, 15:

> "... The real issue is whether ... such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice ... the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct."

And, at page 17, the Court said: "Our concern is with the fair administration of justice."

The applicability of these principles to the case at bar is clear.

Here, the clear import of Judge Boldt's initial statement from the bench during the motion for reduction of sentence proceedings (Exhibit 1), was that he had discussed the case with Judge Tolin both before and after the verdict, had become familiar with "Judge Tolin's views of the case", and "From that I can say and affirm without any question whatever, that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed." (emphasis added) This, in and of itself, is sufficient to call for an inquiry into just what that coram non judice information was so as to make sure that the defendant was afforded a

hearing before a judge and in a tribunal to which he was entitled. Such an inquiry should be conducted before a judge whose conduct was not being inquired into and such other judge should be the one to pass upon the import of the matter after seeing and hearing the participant as a witness.

But the matter became even more complex when, as it turned out, Judge Boldt caused changes to be made in his remarks for the official version of the transcript. In the second statement (Exh. 3, pg. 25), the time of the conversations between Judge Boldt is shifted to after the verdict (rather than before and after). The phrase "of the case" was ordered deleted and the phrase "after the verdict in this case" ordered inserted in lieu thereof. Moreover, the positiveness of Judge Boldt's assurance that Judge Tolin would have imposed more severe sentences is diluted by his ordering the word "would" stricken and the word "might" substituted therefor. (Exh. 1) Additionally, by directing the Court Reporter to excise completely from the transcript the words "From that", Judge Boldt altered the meaning because, with that phrase, it is clear that Judge Boldt was saying, in effect, that he had learned Judge Tolin's views from Judge Tolin. Even as changed, the statement in the transcript (Exh. 3, pg. 25) is still to the effect 1) that Judge Boldt had in mind Judge Tolin's views of the case and, 2) that he received those views from Judge Tolin by talking about them with Judge Tolin.

So again, and in addition, the inquiry as to just what occurred should have been conducted by a judge other than the one whose

conduct is involved and whose testimony should have been heard and seen by such other judge.

But the filing, sua sponte, by Judge Boldt of his affidavit (CT 30-32) after the §2255 motion was filed and the use thereof made by Judge Boldt at the hearing, surely makes it completely manifest that Judge Boldt should have been a witness in the case and should not have presided over the proceedings. By that affidavit, Judge Boldt personally involved himself, as a person, and sought to explain and present the facts of the matter. In that affidavit, Judge Boldt asserted 1) that "Neither the matter of sentence, nor any evidence, procedure, issue or ruling involved in Cause #27973 CD was ever so much as mentioned to me or in my presence by Judge Tolin at any time or place," (CT 31) and that the "views" of Judge Tolin came to be known to him, Judge Boldt, or were "derived solely from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain each time I saw him during the trial." (CT 30)

And so, by ex parte and self-serving statement, and in response to the §2255 motion, Judge Boldt asserts that solely because of the appearance of another judge that that judge, in the course of a long trial, "was laboring under a heavy burden of concern and strain," he was able to (and did) assure defendants, their counsel and the public "without any question whatever" that the sentences imposed "were more lenient than those Judge Tolin would (might) have imposed." (Exh. 1; Exh. 3, pg. 25)

Surely these conflicts and variances should be resolved and

they could only be resolved in the manner devised by Anglo-Saxon jurisprudence -- by questioning the witness whose statements are being examined in open court before a judge who is not himself involved in them.

The actual hearing at which petitioner's counsel sought to bring forth the facts demonstrated that that occurred against which the Supreme Court had set its face in Re Murchison, 349 US 133, 138. Here, as there,

> "the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred ... and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross examination."

Thus, when petitioner's counsel requested permission to ask Judge Boldt some questions (RT 53), Judge Boldt required them to make an offer of proof (ibid). Thereupon, petitioner's counsel advised the Court (RT 55) that it was their desire that Judge Boldt answer the questions which had theretofore been made a part of the record in petitioner's previous motion that Judge Boldt not preside at the hearing, (CT 42-44; Appendix B attached here), the Court replied, not as a witness, but as the Court (RT 57-58):

> "With respect to questions 15 through 19, subdivisions a through g, I will say this, that it is my practice to review the transcript in proceedings similar to those which were had on July 17, 1964, in cause No.

27973-CD of this court, with a view of correcting grammar, correcting what I consider to be mistakes as to what was said, to eliminate repetition and to clarify precisely and exactly what my thought is. And it was for that purpose that I requested a copy of the transcript, for the purpose of doing that very thing.

"The balance of the inquiries, the details that are indicated here, in my opinion, are, in the first place, incomprehensible and irrelevant to any inquiry before us.

"All that I think it is necessary to say on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding."

This was not, we submit, responsive to the questions which had been put, and certainly did not permit of the cross-examination which is deemed to be the appropriate method for bringing out facts before a Court.

The incongruity and the "spectacle" (Re Murchison, 349 US at 139) "of the trial judge presenting testimony upon which he must finally pass in determing (whether to grant or deny petitioner's motion)" (paraphrased from Murchison, ibid) is seen from this further colloquy by the judge (RT 58):

"Now, I want to make it plain that I could have made that statement solely on my affirmation

as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete and unqualified truth, I made it in affidavit form. That statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding."

To counsel's argument (RT 60-61) that the Court was "really . . . passing judgment upon your own statement," that a witness cannot say to a lawyer "I have answered your question," that "only an impartial judge can say to a lawyer that his questions have been answered" and that "some other person (should) sit as judge over this matter as to whether or not your Honor's statement answers all of the questions which we seek to propound", the Court replied (RT 61): "I do not agree with you. I have already ruled on that matter previously, and I don't propose to hear you on it any further."

When petitioner's counsel suggested (RT 61) to the Court in connection with the offer of proof, that if Judge Boldt would permit himself to be questioned along the lines indicated in the written questions (CT 42-44; Appendix B attached hereto), "we expect to be able to demonstrate variances between (the three statements Judge Boldt had made)" and "inconsistencies and conflicts in those statements," but that (RT 62) "this is all we can offer to prove at

this time because we do not know what's in your Honor's mind, and we don't know --," the Court interrupted and said (ibid) (and we suggest this further demonstrates the error in Judge Boldt having presided at the hearing and in not having permitted himself to be a witness):

> "You do know what is in my mind because I have made a statement about it, that I in no manner whatever, at any time or place or under any circumstances in any manner whatever discussed any phase of the trial with Judge Tolin, either before or after verdict, or up until the time of his death. I have made that unqualifiedly on oath, and I now reaffirm it on my honor and integrity as a United States District Judge. And I simply cannot find any possible basis in the line of interrogation that you have indicated here that would lead to any other result or conclusion."
>
> "I make this most solemnly, and with a very, very heavy sense of obligation. I hold as high an office, in my judgment, as man is given to hold. And in the most solemn manner, and without any reservation whatever, I am making this affirmation that I make.
>
> "I need not have made it on oath, because I think the affirmation of a United States District Judge is more solemn than most affidavits that I have read."

And (RT 63):

> . . . "And I make it so, and I make it out of the depth of my conscience, my experience, and my knowledge of what occurred. (emphasis added)
>
> "And in my mind there is just no vestige of merit in your contentions, either of fact or in law, in this proceeding."

But, withal, the fact remains that petitioner was deprived of the right to cross-examine and present in that way "what occurred." We submit that the very thing happened here that was condemned by the Supreme Court, again, in Murchison, 349 US 133, paraphrasing therefrom (pg. 139):

> " . . . (petitioner's motion having been) heard before (Judge Boldt) the result (was both) that the (petitioner)(was) deprived of examining or cross-examining him (and there was) the spectacle of the trial judge presenting testimony upon which he must finally pass in determining (whether to grant or deny petitioner's motion). In (both) event(s) the State (had) the benefit of the judge's personal knowledge while the (petitioner)(was) denied an effective opportunity to cross-examine. . . . "

"The chief function of our judicial machinery is to ascertain the truth." (Estes v. Texas, 381 US 532, 544). The denial of the right to cross-examine cannot be said to contribute to that objective. Cf. Pointer v. Texas, 380 US 400, 404. Judge Boldt should not

have presided at the hearing; he should, however, have been a witness therein, the presence of the former and the absence of the latter denied petitioner due process and a fair hearing.

II

THAT THE SUCCESSOR JUDGE PASSED UPON PETITIONER'S MOTIONS FOR NEW TRIAL, THE JUDGE HAVING THERETOFORE RECEIVED INFORMATION CORAM NON JUDICE CONCERNING THE CASE, DEPRIVED PETITIONER OF LIBERTY WITHOUT DUE PROCESS OF LAW.

At the core of our judicial system is "the theory . . . that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (Patterson v. Colorado ex rel Attorney General, 205 US 454, 462.) Although admittedly, for the reasons set forth above under Point I, petitioner has not been able to develop them fully, the facts here are that prior to the time Judge Boldt was appointed as successor judge, and while the late Judge Tolin was the judge in the case and at a time when there was no reason to anticipate that Judge Boldt would have anything to do with the case or be required to perform any judicial function in connection with it, he, Judge Boldt, received information concerning the case and had that information in mind when he thereafter acted as successor judge. As stated by Judge Boldt toward the end of the motion for modification of

sentence proceedings,

> "I have pretty well in mind Judge Tolin's views of the case, . . . I had occasion to talk with Judge Tolin after the verdict in this case . . . and received some ideas of his views after the verdict in this case." (Exh. 3, pg. 25).

That Judge Tolin and Judge Boldt had spoken about the case and that Judge Tolin had imparted to Judge Boldt the former's views of the case was not known to petitioner or his counsel at the time Judge Boldt was exercising his function as successor judge in passing upon the motions for new trial, was not known to them until all appellate procedures had been completed, and was only learned about by them as a result of Judge Boldt's voluntary statement from the bench. (CT 3, 5, 7; Exh. 1; Exh. 3, pg. 25).

Petitioner's contention should be clearly understood. His point is not that the mere fact that a judge has information about the case or the proceedings upon which he is about to pass, is sufficient to preclude his sitting on a matter. But a distinction must be made between the situation where the judge receives his information in a judicial proceeding, a fact presumably known to the defendant and his counsel, and a situation where the judge derives his information extra-judicially and unknown to the defendant. Thus, cases wherein the judge has received information in the normal course of judicial proceedings, or has presided at a previous hearing or reads the transcript of a previous proceeding in the usual course of his judicial duties, are not the cases which control here

(e. g. United States v. Kravitz, 303 F. 2d 700 [CA 3 1962] and first cases cited in footnote 1, pg. 701).

> "A distinction must be drawn between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the court room."
>
> (In re Federal Facilities Realty Trust, 140 F. S. 522, 526 [ND 111 1956])

"Opinions which have been derived coram judice" (ibid, pg. 527, emphasis in original) are one thing; opinions "derived non coram judice" (Craven v. United States, 22 F.2d 605, 607 [CCA 1 1927] are something else.

While, of course, a judge is more sophisticated than a juror, and can and does make distinctions, and compartmentalizes his thinking in a manner not to be expected of jurors, yet, at base, the right of a defendant to an "indifferent" (Irvin v. Dowd, 366 US 717, 722) judge is the same as his right to "indifferent jurors" (ibid). "It is the duty of a real judge to acquire views from the evidence." (Craven v. United States, 22 F. 2d 605, 607-8 [CCA 1 1927]). But here, Judge Boldt's views were acquired from Judge Tolin. The rationale of the Supreme Court in Irvin v. Dowd, supra, is equally applicable to the case at bar:

> " The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial

'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt 155b. His verdict must be based upon the evidence developed at the trial. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (emphasis supplied)

Circumstances giving rise to Smith v. United States, 360 US 1, are not unlike those here and the argument and reasoning of the concurring Justices in that case should be persuasive and controlling.

In Smith, prior to the time for the defendant's plea, a Special Agent of the Federal Bureau of Investigation had spoken with the trial judge in his chambers about the defendant's background and his connection with the kidnapping charged in the Information. Neither defendant nor anyone representing him was present at the interview. Thereafter, in open court, the defendant pleaded guilty and sentence was imposed. The majority of the Supreme Court reversed the denial of relief under 28 USC 2255 on the ground that petitioner should have been proceeded against by way of indictment and therefore felt it was not necessary to decide the conference in chambers point. The concurring Justices reached this latter point and felt that reversal should have been ordered on the ground that (pg. 17-18) "(i)n a criminal case, such a private conference must be deemed presumptively prejudicial."

The same reasoning is applicable here -- even more so -- for, from the standpoint of petitioner in the instant case, his position is stronger than Smith's, because the fact of the conference in chambers and the nature thereof, were known to Smith at the time of the proceedings in open court, for the judge at that time told the defendant it had occurred. The present petitioner had no such knowledge, neither of the fact nor the nature of Judge Boldt's conversations with Judge Tolin.

It is true that the concurring justices in Smith arrived at their conclusion without reaching the due process contention, but based it solely as a violation of Rule 32(c)(1), Federal Rules of Criminal Procedure, which provides that a pre-sentence investigation report should not be submitted to the court prior to a plea or finding of guilt. But the reasoning of the concurring Justices is weighty and, we submit, persuasive.

We urge that the receipt of extra-judicial information, "presumptively prejudicial" under Rule 32(c)(1), is likewise presumptively prejudicial under the Due Process Clause and that the factual situation in Smith is in substance no different from the case at bar.

The circumstances of this case required that petitioner have had his motions for new trial heard by a judge uninfluenced by information received by him outside the four walls of the courtroom. Cf. McFadden v. United States, 63 F. 2d 111 (CCA 7-1933).

There are many situations in the law where adjudicators receive information they are not supposed to receive or receive it

in an unauthorized manner which, because of its very nature, requires the judicial action which ensues to be set aside even though it cannot be definitively demonstrated that actual prejudice occurred. For example, in Stewart v. United States, 366 US 1, the defendant had not taken the stand at two previous trials, the judgments in which had been set aside because of errors. At the third trial, the defendant did take the stand and the prosecutor during the course of his cross examination asked the question, "This is the first time you have gone on the stand, isn't it Willie?" To which the defendant had answered, "I am always the stand; I am everything, I done told you." (The defense was insanity.) The Supreme Court was not impressed with the Government's argument that this one incident in a long trial was not prejudicial and probably passed unnoticed. Though no prejudice was, indeed, shown, the Supreme Court said (pg. 9):

> "We think it apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations ... the jury might well have thought it likely that petitioner elected to feign this 'testimony' out of desperation ... it might have thought ... the jury might have used the information. ..." (emphasis added)

Only last term, in Estes v. Texas, 381 US 532, 538, involving the televising of court proceedings, the Supreme Court "start(ed) with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused'." And the court

pointed out (pg. 542) that it is not always necessary that the accused establish "isolatable prejudice . . . in order to invalidate a conviction;" that (ibid) the "Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal." Here, as there (ibid) "This is such a case." The Court quoted (pg. 543) from its previous decision in In re Murchison, 349 US 133, 136:

> "A fair trial in a fair tribusinal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 US 11, 14." (emphasis in Court's quotation)

and from its decision in Tumey v. Ohio, 273 US 510, 532:

> "' . . . the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused,

denies the latter due process of law.'" (emphasis in Court's quotation)

Familiar, also, are the confession cases where, though the other evidence points overwhelmingly to defendant's guilt, a conviction obtained where the jury had heard an improperly secured confession will be reversed. E.g. Payne v. Arkansas, 356 US 560, 568:

> "... where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession, vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

Accord: Watts v. Indiana, 338 US 49, 59; Malinski v. New York, 324 US 401, 404; Lyons v. Oklahoma, 322 US 596, 597; Spano v. New York, 360 US 315, 324; Lynumn v. Illinois, 372 US 528, 537; Haynes v. Washington, 373 US 503, 518.

So here. The use by the successor Judge of information obtained coram non judice "vitiates the judgments because it violates the Due Process Clause."

See, also, Barrack v. Van Dusen, ___ F. 2d ___, CA 3 1964,

33 US Law Week 2304:

> "(Litigants are entitled) to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel."

III

THE ADMINISTRATION OF CRIMINAL JUSTICE MUST NOT ONLY BE FAIR; IT MUST GIVE THE APPEARANCE OF FAIRNESS

As pointed out above under Point II, this is familiar doctrine. In Berger v. United States, 255 US 22, 35-36, the Court said:

> " . . . the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial . . . "

In the case at bar, petitioner was subjected, in effect, to a trial at which information was given the judge in what, so far as petitioner was concerned, was a secret proceeding. He was not present nor represented by counsel and he had no opportunity to refute or even meet what was said in those proceedings. The rationale of Re Oliver, 333 US 257 is applicable here. There defendant was held in contempt in a one-man-judge grand jury proceeding wherein the public was not present. Said the Court

(pg. 273):

> " . . . In view of this nation's historic distrust of secret proceedings, their inherent danger to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.
>
> " . . . A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony and to be represented by counsel . . . "

The Supreme Court has required that "justice satisfy the appearance of justice." See In re Murchison, 349 US 133, Offutt v. United States, 348 US 11, Tumey v. Ohio, 273 US 510, quoted supra, page 29.

This court is in accord. Thus, in Connelly v. United States District Court, 191 F. 2d 692, 697 (1951), it said:

> "It is not enough that the judge, despite his predetermination of essential facts, may put them

aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the assurance of fairness and impartiality. . . ."

See also, Saldana v. United States, 365 US 646, 657, and cases there cited, e.g. Communist Party v. Subversive Activities Control Board, 351 US 115, 124:

". . . fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

State cases are similar. For example, in Williams v. Williams, 120 Okla. 12, 249 P. 920 (1926), the judge who was to try a divorce case had talked with the parties about the case outside of court but denied that he had expressed an opinion about the merits of the case. Nevertheless, the Oklahoma court said (pp. 12-13):

"It may be said that the splendid personal character of the trial judge and his official life are sufficient to convince those who are acquainted with him of the truth of his statements, but we do not know that plaintiff has knowledge of such information. Our jurisprudence guarantees a fair and impartial trial to litigants in express terms. As the ultimate powers of the courts to enforce their judgments

must be made to rest upon the public confidence in the good faith and integrity of the courts, it is implicit, and is the concern of the courts, that a case not only be tried fairly, in fact and in law, but in such atmosphere that neither party can point to grounds as a support for the charge that the judgment followed from prejudice or bias of the trial judge.

" . . .

" . . . The trial judge should not have permitted parties to discuss the case, or talk to him about the case, outside of a regular court proceeding, but having permitted the instance to occur, the application for disqualification ought to have been sustained."

And in James v. State of New Jersey, 56 N.J. Super. 213, 152 A. 2d 386 (1959), the judge had by chance seen the defendant when he was brought to jail. The charge was drunk driving. The court, in reversing the conviction, said (pg. 217):

"The magistrate should have immediately disqualified himself because of his personal knowledge of defendant's condition. It is claimed that he had no real occasion to use that knowledge in determining guilt because the State's case was unusually strong and convincing. Even so, the argument is without persuasive weight. The

question is not whether the magistrate actually resorted to his first-hand information in assessing the merits of the case. The evil resided in the possibility of his consciously or unconsciously doing so.

"Here the magistrate's knowledge or impression of defendant's physical state was something that lay outside the record. Defendant had no opportunity to test its trustworthiness, or to explain or rebut it. Under the circumstances, to permit the conviction to stand would offend every standard of fair play and amount to depriving defendant of due process. . . . (emphasis added)

And at 56 N.J. Super. at 218:

" . . . We do not question the representation made by the State that the magistrate here was without actual bias and tried to hold the scales in fair balance. However, it is of the very essence that justice avoid even the appearance of injustice; otherwise courts and judges stand suspect."

The instant case falls well within the principle of the above cases, both as to the §2255 hearing and as to the motion for new trial proceedings.

CONCLUSION

The judgment below should be reversed.

This Court should order that the sentences previously imposed upon petitioner and the orders denying motions for new trial be vacated and set aside and that a new and different judge, other than the Hon. George H. Boldt, be appointed to pass upon petitioner's motions for new trial or, in the alternative and at minimum, that a new hearing of petitioner's 28 USC 2255 motion be held and that said hearing be presided over by a judge other than the Hon. George H. Boldt.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

APPENDIX "A"

List of Exhibits

No.	Identified	Received
Petitioner's 1	32	34
Petitioner's 2	33	35
Petitioner's 3	37, 45	46

APPENDIX "B"

Some Questions Which Counsel for Petitioner Intended to Put to Judge George H. Boldt At The Hearing on Petitioner's Motion Pursuant to 28 USC 2255

1. Did you have occasion to see Judge Tolin during any time in 1961?

2. Please state the date, and place of each such occasion, and who was present or were present.

3. Please state the conversation, if any, at each of such occasions.

4. Were any of these occasions at lunch?

5. On July 17, 1964, did you have in mind Judge Tolin's views of the case of United States v. Carbo et al, No. 27973?

6. On July 17, 1964, did you have in mind Judge Tolin's views of the case before the verdict in the case?

7. On July 17, 1964, did you have in mind Judge Tolin's views of the case after the verdict in the case?

8. Did you and Judge Tolin talk about the case?

9. If so, when, where and in whose presence?

10. What was said and by whom?

11. What were Judge Tolin's views of the case, before the verdict, that you had in mind, on July 17, 1964?

12. What were Judge Tolin's views of the case after the verdict, that you had in mind on July 17, 1964?

13. What is the basis for your statement on July 17, 1964 that you could say and affirm without any question whatsoever that the sentences you imposed you believed to be more lenient than those that Judge Tolin would have imposed?

14. What was your belief, on July 17, 1964 as to what sentences Judge Tolin would have imposed:

As to defendant Carbo?

As to Defendant Sica?

As to Defendant Palermo?

As to Defendant Dragna?

As to Defendant Gibson?

15. Did you instruct, in July 1964, Court Reporter Samuel Goldstein, to make any changes in the transcript of the proceedings of July 17?

16. What were those instructions?

17. Did you instruct the changes to be made because, in your opinion, the draft of the transcript submitted to you by Mr. Goldstein was inaccurate?

18. Did you, on July 17, 1964, make the statements as set forth in the transcript thereof, first submitted to you by Mr. Goldstein.

19. Please explain the reason for each of the following changes in the transcript ordered by you:

a. Deletion of the word "And" after the phrase

"or some remarks of Judge Tolin concerning it;"

b. Deletion of the word "and" after the phrase "and quite often saw each other at lunch;"

c. Deletion of the word "see" in the phrase "I had occasion to see Judge Tolin after the verdict in this case" and substituting therefor the words "talk with;"

d. Deletion of the words "I had" in the phrase "and I had some ideas of his views of the case" and substituting therefor the word "received;"

e. Deletion of the words "of the" from the phrase "and I had some ideas of his views of the case" and inserting in lieu thereof, the words "after the verdict in this;"

f. Deletion of the words "From that" in the phrase "From that I can say and affirm without any question;"

g. Deletion of the word "would" in the phrase "than those that Judge Tolin would have imposed" and inserting in lieu thereof the word "might".

20. Is it your customary practice to form an impression, upon knowing that a fellow judge is presiding over a long criminal trial, and appears to be laboring under a heavy burden of concern and strain that therefore that judge will impose upon the defendants in such a case a severe sentence?

21. Have you ever formed such an impression under such circumstances with respect to any judge, other than Judge Tolin in the instant case?

22. If so, please state the circumstances.

23. Have you, as a Judge of a United States District Court, ever labored under a heavy burden of concern and strain in a criminal case?

24. If so, have you, because of such burden, imposed severe penalties on defendants?

25. Did you labor under a heavy burden of concern and strain in the course of your duties as Judge in the instant case?

26. When you observed Judge Tolin, did you know that he had had at least two heart attacks, that he was suffering from agina pectoris, and that he was under a physician's care?